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In The

Supreme Court of the United States

October Term, 1993

PETE WILSON, Governor of the
State of California;
JAMES W. VAN LOBEN SELS,
Director the California
Department of Transportation,

Petitioners,

vs.

WILLIAM BIGGS, et al,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Congress may, in exercising its powers under the Commerce Clause, assume plenary authority to dictate the terms and conditions of employment of state employees when this Federal intrusion:

   a. Directly affects the political dynamics of the budget process, infringing upon and effectively destroying fundamental aspects of state sovereignty essential to California's separate and independent existence; and

   b. Undermines the constitutionally mandated balance of power between the state and federal government.

2. Whether the finding of the Ninth Circuit violates California's Tenth Amendment protection of state sovereignty as that principle has been recognized in this Court's opinions in *Gregory v. Ashcroft*, ___ U.S. ___, [111 S.Ct. 2395] (1991) and/or *New York v. United States*, ___ U.S. ___, [112 S.Ct. 2408] (1992).

3. Whether, in light of the Ninth Circuit's intrusion into the California constitutionally mandated budget process, this Court should reconsider the Tenth Amendment's protection of governmental functions carried out by states as states, and in so doing, overrule its decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

PARTIES BELOW

Petitioners (defendants below) are the Governor of the State of California and the Director of the California State Department of Transportation. Other defendants below included the Treasurer of the State of California and the Controller of the State of California. The Treasurer and Controller were defendants in the district court proceedings but declined to participate in the appeal to the Ninth Circuit Court of Appeals.

Respondents (plaintiffs below) are William Biggs, Sam Stephen, Marty Cohen, Fran Landeros, Don Nave and Don Wesley, together with other unnamed employees of the California Department of Transportation who have filed consents to participate in the district court litigation pursuant to 29 U.S.C. section 216(b).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Factual Background 1

B. The District Court Litigation 4

C. The Ninth Circuit Opinion 6

REASONS FOR GRANTING REVIEW 7

A. The Existence or Nonexistence of an Implied Timely Payment Requirement Under the Fair Labor Standards Act Constitutes a Critical Question of Federal Law, and the Court Should Settle this Important Question, Especially Where, as Here, the Existence of Such Requirement Would Preclude the Sovereign Exercise of State Fiscal Powers 9

B. The Ninth Circuit's Conclusion That Imposition of an Implied "Timely Payment" Requirement Upon the States Does Not Violate State Sovereignty Is in Conflict With Applicable Decisions of This Court 14

C. This Court should Reconsider Its Decision in *Garcia*, Recognizing that Basic Governmental Functions at the State Level Require Tenth Amendment Protection 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES CITED

Bratt v. Los Angeles County, 912 F.2d 1066 (9th Cir. 1990), cert. den. 498 U.S. 1086 (1991) 10

Doyle v. United Technologies Corp., 487 U.S. 500 (1988) 16

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) ..... *passim*

Gregory v. Ashcroft, ___ U.S. ___, [111 S.Ct. 2395] (1991) ..... *passim*

National League of Cities v. Usery, 426 U.S. 833 (1976) 13

New York v. United States, ___ U.S. ___, [112 S.Ct. 2408] (1992) 7, 8, 14, 15, 20

Sugarman v. Dougall, 413 U.S. 634 (1973) 16

STATUTES

U.S. Const. Amend. X 20

29 U.S.C. § 201 4

§ 206 1

§ 207 1

§ 216(b) ii

§ 260 9

33 U.S.C. § 914(e) 11

§ 914(f) 11

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2016 14

§ 2021 14

46 U.S.C. § 10313 11

46 U.S.C. § 10504 11

Cal. Const. Art. IV, § 12 2

Cal. Const. Art. IV, § 12(a) 2

Cal. Const. Art. IV, § 12(c) 2

Cal. Const. Art. XVI, § 7 3

Cal. Gov. Code § 13340 3

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Page

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Opinion of the (California) Legislative Counsel, 1957 A.J. 1350 3

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 1 F.3d 1537 (1993) and is reproduced at App., pp. A-1-A-25. The prior decision of the district court (no judgment issued) was not published and is reproduced at App., pp. A-52-A-63.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on August 12, 1993, affirming the order of the United States District Court for the Eastern District of California dated October 3, 1991. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the construction of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. sections 206 and 207, respectively. These sections are reproduced in their entirety in the Appendix. (App., pp. A-26-A-51.)

STATEMENT OF THE CASE

A. Factual Background

The essential facts relating to this case are undisputed. The State of California operates on a fiscal year basis, from July 1 to June 30 of the following year. Within

the first 10 days of each calendar year, the Governor is required to submit a proposed budget to both houses of the California Legislature for the ensuing fiscal year by express provision of the California Constitution. (Cal. Const. Art. IV, § 12(a).) In turn, the Chair of the fiscal committee in each house of the Legislature introduces the Governor's proposed budget in bill form. The California Constitution imposes a deadline of June 15 by which the Legislature shall submit a final budget to the Governor. (Cal. Const. Art. IV, § 12(c).) When this deadline is not met, as was the case in 1990, the delay results in the State entering the new fiscal year without a budget in place.

These California constitutional provisions were the direct result of the democratic political process undertaken in 1922, when state voters amended the Constitution to create an integrated executive budget. (Cal. Const. Art. IV, § 12.) By implementing this change, the public repudiated a previously existing fragmented and chaotic budget process, rife with logrolling and conflicts of interest. (Arthur A. Buck, *Public Budgeting: A Discussion of Budgeting Practice in the National, State, and Local Governments of the United States,* Harper & Bros. Publishers (1929), p. 12.)

California's comprehensive budget process thereafter prohibited issuance of warrants without spending authority and made such authority dependent on the enactment of a budget. The Budget bill must be passed by both houses of the California Legislature and sent to and approved by the Governor before other appropriations bills may be considered by either house without the approval of the Governor. (Opinion of the Legislative

Counsel, 1957 A.J. 1350.) The California budget provisions have two main purposes: (1) to require formulation, explanation, introduction, and defense of a comprehensive document which systematically considers all revenues and expenditures as a whole, and (2) to require that a spending plan be in place before state revenues may be disbursed.

This political process assures that in jointly considering the priority of expenditures, the California executive and legislative branches of government take into account questions that are the essence of state sovereignty: the appropriate level of fiscal debt, whether or not to raise taxes, and whether or not to decrease expenditures and if so, in what manner. This task is often daunting: for the 1990 through 1991 budget year the deficit faced in June, 1990 was $3.6 billion dollars. (*State Spending Plan for 1990-91, the 1990 Budget Act and Related Legislation*, Elizabeth Hill, Legislative Analyst (August, 1990).) As a result, the political process resulted in California entering the new fiscal year commencing July 1, 1990, without a budget in place. In such event, the California Constitution, as well as a state statute, precluded the issuance of funds for any remuneration of state employees for their work absent legislative authorization. (Cal. Const. Art. XVI, § 7, Cal. Gov. Code § 13340 (Stats. 1990).)

Most employees of the State of California are paid once a month, on or about the last day of the month. Plaintiffs below (hereinafter "plaintiffs"), however, are paid semi-monthly, once on or about the 15th day of the month and once on or about the last day of the month. In July 1990, the 15th fell on a Sunday, and, therefore, plaintiffs would normally have been paid on Monday, July 16.

As of that date, however, a State budget had not yet been enacted into law. Consequently, there was no legal appropriation for the payment of salaries and the State Controller and Treasurer lacked the necessary authority under the California Constitution and applicable state statutes to issue pay warrants. (*Ibid.*) State law guarantees that once a budget is passed, employees will receive full compensation for all work performed during the period when no budget was in place. Plaintiffs were so compensated on July 30 and 31, 1990, in an amount exceeding five million dollars. (App., p. A-53.) Nonetheless, plaintiffs brought this action to compel the State, in the absence of a budget, to issue the pay warrants normally issued on July 16, 1990.

B. The District Court Litigation

The underlying action was filed in the United States District Court for the Eastern District of California on July 23, 1990. Plaintiffs claimed entitlement under the Fair Labor Standards Act (FLSA), 29 U.S.C. sections 201, et seq., to receive their wages "promptly" when due on the regularly scheduled payday, even though the California Constitution and statutes expressly precluded payment in the absence of a State budget.

The request of plaintiffs for a temporary restraining order and preliminary injunction was denied by the district court on July 27, 1990. Subsequently, the California Legislature passed a budget on July 28, which was signed by the Governor on July 31, 1990. Plaintiffs were paid on July 30 or July 31, 1990. (App., pp. A-52-A-53.)

Plaintiffs continued the prosecution of this action, seeking declaratory and injunctive relief, liquidated damages and prejudgment interest. The district court heard argument on cross-motions for summary judgment on September 23, 1991, and rendered a decision thereon on October 3, 1991. The district court concluded that the FLSA contained an implied requirement that wages be paid promptly when due, even though the district court (as well as the Ninth Circuit in reviewing its decision) acknowledged that the FLSA only provides that an employer "shall pay" a minimum wage. (App., p. A-53, 1 F.3d at 1539, p. A-7.) The district court further concluded that such a requirement, applied to the State of California at a time when no budget existed, did not abrogate the State's sovereignty under the Tenth Amendment. (App., p. A-58.)

The district court granted declaratory relief and prejudgment interest, but denied the request for liquidated damages and injunctive relief. (App., pp. A-62-A-63.) Plaintiffs then moved for relief from a pre-trial scheduling order concerning discovery and moved to amend the complaint. These motions were denied by the district court on January 13, 1992.

Plaintiffs appealed from the district court's denial of liquidated damages and their motion for relief to amend to the Ninth Circuit Court of Appeals. This appeal was designated No. 92-15334. In an unpublished memorandum opinion that is not the subject of the instant Petition, the Ninth Circuit affirmed the district court on these issues. The Governor of the State of California and the Director of the California Department of Transportation appealed from the district court's ruling on the cross-

motion for summary judgment. This appeal was designated 92-15936, and is the subject of the instant petition.

C. The Ninth Circuit Opinion

The Ninth Circuit affirmed, adopting an even more stringent standard than that which was crafted by the district court. The Ninth Circuit rejected petitioner's claims that the FLSA did not contain an implied "prompt payment" requirement, and further rejected the district court's balancing test which required "payment which is reasonably prompt under the totality of circumstances in the individual case." Instead, the Ninth Circuit held that a violation of the FLSA occurs when, for any reason, the minimum wage is not paid on payday. (1 F.3d at 1540, App., pp. A-10-A-11.)

The Ninth Circuit further affirmed the district court's conclusion that this implied "timely payment" requirement did not violate the State of California's sovereignty under the Tenth Amendment. The court concluded that any interference that a "timely payment" requirement would inflict on California's constitutionally prescribed budget process was caused by state as opposed to federal law, as the FLSA did not require California to pass a budget on time. The FLSA instead required California to pay the minimum wage on time. The court then concluded that since California made its "federal obligation (paying employees on payday as it found required by implication under the FLSA) dependent upon the operation of the state law," the federal law was not rendered unconstitutional. (1 F.3d at 1544, App., pp. A-18-A-19; parenthetical added.)

Finally, the Ninth Circuit rejected petitioner's claims that an implied prompt payment requirement as applied to the States contravened this Court's holdings in *Gregory v. Ashcroft*, ___ U.S. ___ [111 S.Ct. 2395] (1991) and *New York v. United States*, ___ U.S. ___ [112 S.Ct. 2408] (1992). Reading both decisions narrowly, the Ninth Circuit found that the plain statement rule of *Gregory* was satisfied "since the FLSA clearly applies to state employees such as Biggs." (1 F.3d at 1544, App., p. A-19.) As to *New York*, the court characterized the decision as one that involved Congress exceeding its Article 1 powers, and as such was inapplicable because "there is no dispute that the FLSA was an appropriate exercise of federal power." (*Ibid.*)

REASONS FOR GRANTING REVIEW

The questions presented in this petition are of critical importance. The Ninth Circuit held, in a case of first impression, that a public (or private) employer which for any reason fails to pay its employees on their regularly scheduled payday *automatically* violates the Fair Labor Standards Act. That decision, if allowed to stand, will subject all employers to ruinous awards of liquidated damages no matter how short and/or justified the delay. As the concurring and dissenting opinion noted, this liability will accrue to the employer no matter whether the delay is occasioned by natural disaster, illness, bankruptcy, computation breakdown, late mail, or state fiscal crisis. (1 F.3d at 1546, App., p. A-25.)

For public employers such as the state of California, whose political mandate precludes payment to their

employees without a budgetary appropriation, the Ninth Circuit decision permits no exercise of state fiscal sovereignty other than as an accounting function in furtherance of a federal regulation. The finding of an implicit requirement for payment on the regularly scheduled payday that allows for no exceptions effectively nullifies the state's budgetary process. The decision has touched the very heart of state sovereignty. Further, as will be explained, contrary to the Ninth Circuit's reasoning, the imposition of liquidated damages in such cases will likely be automatic.

Beyond the importance of the first question presented in this petition to public employers covered by the FLSA, the second and third questions presented are of paramount significance to the States and their political subdivisions. With respect to the second question, it will be demonstrated that the Ninth Circuit's conclusion that reading an implied "prompt payment" requirement into the FLSA *as applied to the states* does not violate the Tenth Amendment directly conflicts with this Court's decisions in *Gregory v. Ashcroft, supra,* ___ U.S. ___ [111 S.Ct. 2395] and *New York v. United States, supra,* ___ U.S. ___ [112 S.Ct. 2408].

Finally, through presenting the third question petitioners are respectfully inviting the Court to consider abandoning *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), and replacing it with a definition of the Tenth Amendment state sovereignty that both respects the States' role in a federal system of government and acknowledges the realities of the federal-state relationship.

A. The Existence or Nonexistence of an Implied Timely Payment Requirement Under the Fair Labor standards Act Constitutes a Critical Question of Federal Law, and the Court Should Settle this Important Question, Especially Where, as Here, the Existence of Such Requirement Would Preclude the Sovereign Exercise of State Fiscal Powers

The Ninth Circuit has fashioned a rule that will have disastrous consequences for employers, both private and public alike. Delays in making payroll are not infrequent and, as Judge Trott noted in his concurring and dissenting opinion, often occur under circumstances that involve little or no fault of the employer, including natural disasters, death or illness, computer failure, late mail, bankruptcy, or fiscal crises (1 F.3d at 1546, App., p. A-25.) (Trott, J., concurring and dissenting). Yet against this backdrop, absent certiorari review by this Court, an employer who is even *one day late* in making payroll will be *automatically* penalized under the liquidated damages provisions of the FLSA[1] in an amount of 100 percent of that portion of the employee's wages that represents the minimum wage.

The Ninth Circuit majority's effort to temporize the effect of its rule is unavailing. The majority characterized 29 U.S.C. section 260 as providing that "an employer who acts in good faith is not subject to liquidated damages," (1 F.3d at 1541, App., p. A-12). However, the FLSA is not concerned with good faith in the abstract. Section 260 provides that:

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[1] 29 U.S.C. § 260.

> " . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title."

Generally, the standard set forth in section 260 is described as a two-part test. The first part is a subjective inquiry into the employer's good faith through an examination of whether it had "an honest intention to ascertain what [the FLSA] requires and to act in accordance with it." (*Bratt v. Los Angeles County*, 912 F.2d 1066, 1072 (9th Cir. 1990), cert. den. 498 U.S. 1086 (1991).) The second is an objective test of whether the employer had reasonable grounds for believing that its conduct complied with the Act. (*Ibid.*)

This test will be of no future assistance to an employer, which, through little or no fault of its own, fails to meet payday. In light of the test adopted by the Ninth Circuit, no employer in this circuit that misses payday, by as little as one day, for whatever reason, will be able to claim that it had reasonable grounds for believing that this inaction did not violate the FLSA.

This rigid judicial requirement for public employers operating within the Ninth Circuit is set against an acknowledged record of Congressional silence during the first 55 years of the FLSA's existence. The FLSA has

always been recognized as "silent on when wage payments were due." (Becker, *The Check Is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L.Rev. 1241, 1244 (1993), citing Indiv. Empl. Rts. Man. (BNA) § 519.107 at 13 (Apr. 1990).) The Ninth Circuit itself noted that "the FLSA does not in terms say that a minimum wage must be paid promptly." (1 F.3d at 1539, App., p. A-7.) Although Congress has enacted "prompt payment" penalties in other laws (see, e.g., 33 U.S.C. §§ 914(e), (f); 46 U.S.C. §§ 10313, 10504), it did not see fit to do so in the FLSA.

Prior to the decisions of the district court and the Ninth Circuit in the instant case, "[w]hether the FLSA implicitly requires timely payment remain[ed] an open question. . . . " (*Becker, supra*, at p. 1244.) None of the authorities relied upon by either the district court or the Ninth Circuit involved delays in payment measured in days or weeks, but rather in months or years. Thus, prompt payment problems existed long before the enactment of the FLSA, yet only now has a court ruled that Congress intended rigid payment requirements to be within the implicit purview of the Act itself.

The court's interpretation, lacking any Congressional support, warrants immediate relief. This issue is not a "State of California" problem alone or even one of all states and political subdivisions alone; it is a problem for *all* employers. For the private employer who is late on payroll because of tight finances, a 100 percent of minimum wage liquidated damages award likely will supply the final nail to the economic coffin.

The fiscal structure of state government in California, delineated in both constitutional and statutory provisions, is predicated upon a principle of self-government that assures monies cannot be spent from the state Treasury absent a valid, legal state appropriation. The employees who brought suit in the instant case were not paid on their regularly scheduled mid-month payday in July 1990 because a state budget had not yet been enacted into law and no other appropriation existed that would permit payment under California law.

The Ninth Circuit concluded that fashioning a timely payment requirement and applying it to the State of California did not violate the Tenth Amendment because:

> "To the extent compliance with the FLSA interferes with the state budgetary process, that interference is caused by a state law, not federal law. The FLSA does not require California to pass a budget on time; it only requires California to do what all employers must do – pay its employees the minimum wage on payday. That California has made its federal obligation dependent upon the operation of state law does not render the federal law unconstitutional." (1 F.3d 1543, App., pp. A-18-A-19.)

If that is the law, then federalism is indeed dead. Under the above reasoning, any congressional intrusion into matters of state concern may be rationalized. This is so even if the congressional intrusion admittedly is not apparent on the face of the federal enactment. Under such judicial analysis, the result is surely that "the Constitution is deemed to fix the principal locus of Tenth Amendment adjudication in Congress." (Van Alstyne, *The Second*

Death of Federalism, 83 Mich.L.Rev. 1709, fn. 52 and accompanying text (1985).)

In *Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. 528, this Court reversed its earlier decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and held that application of the overtime and minimum wage requirements of the FLSA to the States did not exceed the limits of the federal government's power to interfere with state functions. (*Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at pp. 554, 557.) In doing so, this Court departed from a test for determining immunity from federal regulation that was based largely upon whether the federal statute "impaired [the State's] ability to structure integral operations in areas of traditional governmental functions." (*Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at pp. 531, 537).

In essence, this Court decided in Garcia that the State's sovereignty was not unconstitutionally infringed upon by treating the States' functional operations as any other employers' enterprise would be treated for purposes of minimum wage and overtime laws. (*Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at p. 554.) A different matter is presented by the instant case. If a requirement to pay employees immediately at the end of the pay period is read into the FLSA, the enforcement of such a requirement is in complete derogation of the California Constitution and statutory provisions regarding the budget process carried out by the executive and legislative branches of state government.

Garcia neither compels nor sanctions such a result. This Court stated therein that:

> " . . . we need go no further than to state that we perceive nothing in the overtime and minimum wage requirements of the FLSA, *as applied to SAMTA*, that is destructive of state sovereignty or violative of any constitutional provision." (*Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at p. 554; emphasis added.)

Unlike the governmental activity under review in *Garcia*, here the process by which a state formulates its budget and controls expenditures is inherently political in nature and within the sovereign domain of the state. The Ninth Circuit's conclusion that the FLSA includes an implied requirement of timely payment, irrespective of state political processes, results in an invasion by the federal government into the very core of state self-governance. Through judicial interpretation, the exercise of state sovereignty has clearly been abrogated.

B. The Ninth Circuit's Conclusion That Imposition of an Implied "Timely Payment" Requirement Upon the States Does Not Violate State Sovereignty Is in Conflict With Applicable Decisions of This Court

The Ninth Circuit's decision further conflicts with the recent decisions of this Court in *New York v. United States*, ___ U.S. ___, *supra*, [112 S.Ct. 2408] and *Gregory v. Ashcroft, supra*, ___ U.S. ___, [111 S.Ct. 2395]. In *New York*, this Court invalidated a provision in the Low Level Waste Policy Act (42 U.S.C. §§ 2016-2021); which "impermissibly

directed the States to regulate in this field." (*New York v. United States*, ___ U.S. ___, *supra*, [112 S.Ct. at p. 2420].) In reaching this conclusion, this Court declared that:

> "Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the states to enact or administer a federal regulation program." (*New York v. United States*, ___ U.S. ___, *supra*, [112 S.Ct. 2435].)

In *New York*, the state was faced with:

> " . . . a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress." (*New York v. United States*, ___ U.S. ___, *supra*, [112 S.Ct. 2408].)

Here, the State of California, as well as any other states and political subdivisions with fiscal accountability provisions, are faced with a similar "choice": legislate an appropriation for the payment of public employee salaries by a date certain or "accept" the imposition of a huge liquidated damages award.

The Ninth Circuit dismissed the significance of *New York* by characterizing the factual scenario under review in *New York* as one in which Congress exceeded its Article 1 powers, while in the instant matter it held there was "no dispute that the FLSA was an appropriate exercise of federal powers." (1 F.3d 1544, App., p. A-19). But the Supreme Court's concern with federal intrusion into State legislative processes is plainly broader than that acknowledged by the Ninth Circuit. Displacement of state law occurs only where a significant conflict exists between an identifiable federal policy or interest and the operation of state law or where the application of state law would

frustrate specific identifiable objectives of federal legislation. (*Doyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988).)

The Ninth Circuit's evisceration of the principles articulated in *Gregory v. Ashcroft, supra,* offers another compelling reason for this Court to grant certiorari. *Gregory* reinforced the principle that the States' political functions are still protected by the Tenth Amendment in the aftermath of *Garcia*. There, this Court examined the application of the Age Discrimination in Employment Act (ADEA) to a State constitutional provision that provided for mandatory retirement of judges at age 70. In discussing the application of the ADEA to the mandatory retirement provision, the court noted that:

> "This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. *Through the structure of its government,* and the character of those who exercise government authority, a State defines itself as sovereign.: (*Gregory v. Ashcroft, supra,* ___ U.S. ___, [111 S.Ct. at p. 2400], (emphasis added.)

Consistent with this declaration, this Court went on to cite with favor a passage from *Sugarman v. Dougall,* 413 U.S. 634 (1973), which recognized the " . . . State's constitutional responsibility for the establishment and operation of its own government." (*Gregory v. Ashcroft, supra,* ___ U.S. ___, [111 S.Ct. at p. 2401.] The court noted that in *Sugarman* it had acknowledged the unique nature of state decisions that "go to the heart of representative government." (*Ibid.*)

The Ninth Circuit's conclusion that an implied timely payment requirement does not violate State sovereignty is plainly in error in light of *Gregory*. Moreover, the Ninth Circuit has failed to follow the path laid down in *Gregory* that would have avoided any potential conflict with principles of federalism. In *Gregory*, this Court ultimately found that the issue of whether the ADEA applied to state judges was ambiguous and concluded that:

> "In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions . . . " (*Gregory v. Ashcroft*,___ U.S. ___, *supra*, [111 S.Ct. at p. 2406].)

Of particular import is the following passage:

> "We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528; 105 S.Ct. 1005; 83 L.Ed.2d 1016 (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the states against intrusive exercise of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. '[T]o give the state displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect state's interests.' L. Tribe, American

Constitutional Law § 6-25, p. 480 (2d 3d. 1988.)" (111 S.Ct. at p. 2403, emphasis in original.)

The instant case involves a federal law that is not merely ambiguous, but totally silent on the key issue: timely payment. Moreover, the federal intrusion into the structure of state government in the instant case is far more egregious than that in *Gregory*. Yet the Ninth Circuit concluded that *Gregory* stood only for the proposition that under the plain statement rule, Congress must make clear its intention to preempt historic powers of the State before it may do so, and this requirement was satisfied because the FLSA "clearly applies to state employees." (1 F.3d at 1544, App., p. A-19.)

The Ninth Circuit's conclusion ignores the constitutional dimensions of *Gregory* and renders its "plain statement" rule a nullity. If all that must be shown is a general application of a federal statute to the States, then this Court would have reached the opposite conclusion in *Gregory* on the issue of intrusion by Congress into state governmental functions, since Congress did clearly intend the *general* application of the ADEA to the States.

Garcia left protection of sovereign state interests to the national political process. (*Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at p. 554.) *Gregory* recognized that this protection was dependent on a clarity of intent by Congress to exercise its authority in derogation of state sovereignty. (*Gregory v. Ashcroft*, ___ U.S. ___, *supra*, [111 S.Ct. 2395].) If the Ninth Circuit's decision stands, that protection simply does not exist. Absent certiorari review, States will be unable to protect themselves from federal incursions into matters involving

the states acting as states. This result is particularly unwarranted where the federal statute involved contains no language showing the federal incursion was even contemplated by Congress.

C. This Court should Reconsider Its Decision in *Garcia*, Recognizing that Basic Governmental Functions at the State Level Require Tenth Amendment Protection

The *Garcia* decision found that the principal limit on the federal commerce power must be judicially recognized as the built-in restraint provided through state participation in federal governmental action. (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 at p. 554 (1985).) But it has been widely recognized that the national political process not only fails to protect state and local concerns, it is actively hostile to them (Lee, *The Political Safeguards of Federalism? Congressional Response to Supreme Court Decisions on State and Local Liability*, 20 The Urban Lawyer, 301, 307 (1988); Denny, *Breakdown of the Political Safeguards of Federalism: A Response to Garcia v. SAMTA*, 3 Journal of Law & Politics, 749, 753-766 (1987).) Indeed, it has been argued that the *Garcia* decision "places the states at the mercy of Congress, precisely what the Founders meant to avoid" (Raoul Berger: *Federalism: The Founders' Design* 165 (1987); see also *The Federalist No. 78* (Alexander Hamilton) (Clinton Rossiter ed., 1961 discussing the counter-majoritarian check the judiciary should provide on the other branches.)

In *Gregory*, this Court held that state functions going to the heart of representative government are inviolate.

(*Gregory v. Ashcroft, supra,* ___ U.S. ___ [111 S.Ct. at p. 2403].) One commentator believes that it can be presumed if Congress had made its intention clear by amending the ADEA to explicitly cover state court judges, the Tenth Amendment would yet have been found to be violated because the determination of judicial qualification is an integral part of the proper exercise of state sovereignty. (Schmidt: *The Tenth Amendment: A "New" Limitation on Congressional Commerce Power,* 45 Rutgers Law Review 417, 470 (1993).)

The Tenth Amendment explicitly reserves power to the States, and *to the people* (U.S. Const. Amend. X). Indeed, this Court has recently reaffirmed its respect for the Founders' choice of a Constitution that confers upon Congress the power to regulate individuals and not states. (*New York v. United States,* ___ U.S. ___, *supra,* [112 S.Ct. at p. 2422-2423].) In the instant matter, the political will of the California voters has been cast for over seventy years in favor of an integrated state budget. To permit the Ninth Circuit's decision to stand under these circumstances undermines representative government as preserved through the Tenth Amendment's recognition of state sovereignty.

CONCLUSION

The doctrine of federalism embodied in the Tenth Amendment to the United States Constitution is one intended to assure that local concerns will be administered, superintended, and regulated by the states as those are the governmental affairs with which the people are "more familiar and minutely conversant." (*The Federalist*, No. 46, (James Madison); Clinton Rossiter ed., 1961, p. 316.) As Justice O'Connor noted in the dissent to *Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at p. 580,

> " . . . the true 'essence' of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme. (Citing *Younger v. Harris*, 401 U.S. 37, 44 (1971).) If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States."

Certainly one of the principal legitimate interests of the states as so envisioned would include the ability of California to carry out its fiscal responsibility in accordance with the mandate of its citizenry. The Ninth Circuit decision in *Biggs v. Wilson* abrogates California's sovereign ability to assure state payrolls are issued in accordance with state law. This Court should grant the Petition

for Writ of Certiorari to decide these important issues of federalism.

Respectfully submitted,

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Dated: November 10, 1993

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM BIGGS, et al., *Plaintiffs-Appellants-Cross-Appellees,* v. PETE WILSON, Governor; KATHLEEN BROWN, Treasurer; GRAY DAVIS, Controller, et al., *Defendants-Appellees-Cross-Appellants.*	Nos. 92-15334, 92-15936 D.C. No. CV-90-00942-WBS OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
May 11, 1993 – San Francisco, California

Filed August 12, 1993

Before: Stephen Reinhardt, Stephen S. Trott, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer; Dissent and Concurrence by Judge Trott

SUMMARY

Labor and Employment/Compensation/Government Law

The court of appeals affirmed a judgment of the district court. The court held that the mandate of the Fair

Labor Standards Act that an employer pay its employees the minimum wage implicitly required such wages to be paid promptly when due, and that application of that requirement to an employer/state was not a violation of the Tenth Amendment.

Due to the California state budget impasse, highway maintenance workers for the state, including appellant William Biggs, were paid two weeks after a regularly schedule payday pursuant to state law prohibiting the release of paychecks until an approved budget was in place. Biggs and others brought suit on behalf of a class of such workers under the FLSA. The district court summarily granted declaratory relief and prejudgment interest to the workers. All parties appealed.

[1] The FLSA's language that every employer shall pay the minimum wage must be construed as requiring payment on payday [2] because otherwise the Act's imposition of liability for liquidated damages would be meaningless, [3] as would its provisions for prejudgment interest [4] and the limitation of actions. [5] Any construction distinguishing between late payment and nonpayment would force all parties and the courts to guess when nonpayment had occurred in order to trigger those provisions, which would contravene the obligation to construe the FLSA to the furthest reaches consistent with congressional intent to protect employees.

[6] That conclusion was consistent with the views of other courts [7] and the Department of Labor's opinion of the statute.

[8] To the extent that compliance with the FLSA interfered with the state's budgetary process, such interference arose as a consequence of state law only. That California had made its FLSA obligation dependent upon the operation of state law did not preempt the FLSA under the Tenth Amendment as to California as an employer.

Judge Trott, dissenting and concurring, opined that the panel's bright-line rule supplied the hard place for employers already against the rock of a flood, earthquake, fire, drought, computer failure, or fiscal crisis.

COUNSEL

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Christopher W. Waddell, Chief Counsel, Department of Personnel Administration, Sacramento, California, for the defendants-appellees-cross-appellants.

Gary M. Messing and Cathleen Williams, Carroll, Burdick & McDonough, Sacramento, California, for amicus curiae California Correctional Peace Officers Association, et al.

Craig Becker, U.C.L.A. Law School, Los Angeles, California, for amicus curiae Service Employees International Union, AFL-CIO.

OPINION

RYMER, Circuit Judge:

This appeal requires us to decide whether California violated the minimum wage provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19, by paying wages 14-15 days late because there was no state budget, and thus no funds appropriated for the payment of salaries, on payday. The district court granted a summary judgment declaring that the failure to issue paychecks promptly when due violated the FLSA. We agree, and hold that under the FLSA wages are "unpaid" unless they are paid on the employees' regular payday.

I

Payday in this case – July 16, 1990[1] – came and went without highway maintenance workers employed by the State of California Department of Transportation being issued their pay checks. California was undergoing one of its perennial rites, the budget impasse. In 1990, State law prohibited the release of paychecks until a budget was approved by the Legislature and signed by the Governor. That didn't happen until July 28, when the budget passed the Legislature, and July 31, when then-Governor Deukmejian signed it into law. The payroll was met on July 30 and 31, 14-15 days late.

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[1] Both sides concede that this was the employees' payday. Therefore, we do not comment on how to define an employee's payday.

William Biggs represents a class of highway maintenance workers who brought suit against the Governor, Treasurer, Controller, and Transportation Director (collectively "state officials"). The class seeks injunctive and declaratory relief, liquidated damages, and prejudgment interest on account of the delay in receiving wages.

Both sides moved for summary judgment. The district court filed a memorandum and order on October 3, 1991 in which it denied injunctive relief but declared that the state officials' failure to issue paychecks to the class promptly when due violated the Fair Labor Standards Act.[2] It refused to award liquidated damages pursuant to 29 U.S.C. § 216(b) for two reasons: because the liability under § 216(b) extends to an employer and the employer in this case, the State of California, was not named as a party; and because the state acted in good faith. Biggs's request for prejudgment interest was granted.

State officials now appeal[3] the district court's October 3, 1991 order, raising two issues: whether the FLSA contains an implicit requirement that wages be paid

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[2] We assume that the declaratory relief granted is, as stated in the order portion of the district court's memorandum and order, as follows: "It is therefore declared that defendants' failure to issue plaintiffs' paychecks when due violates the Fair Labor Standards Act."

[3] The district court ruled against Biggs on several procedural matters. Biggs's appeal from these rulings is resolved in a separate, unpublished memorandum disposition (No. 92-15334). This appeal concerns only No. 92-15936.

promptly, and if so, does it violate the State of California's Tenth Amendment sovereignty.[4] No appeal is taken from the award of prejudgment interest. Both sides agree that there are no material factual disputes, and that our review is de novo. We have jurisdiction pursuant to 28 U.S.C. § 1291.[5]

II

The FLSA requires that an employer pay each employee a minimum wage set by the Act. 29 U.S.C. § 206. Section 206(b) mandates that "every employer shall pay" employees the minimum wage if "in any workweek [the employee] is engaged in commerce."[6]

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[4] The California Correctional Peace Officers Association, the California Union of Safety Employees, and the California Department of Property Employees Association; and the Service Employees International Union, AFL-CIO have appeared as amici curiae in support of Biggs.

[5] No separate judgment was entered on the district court's October 3, 1991 order, which would have been helpful because it is not entirely clear against whom the order runs. However, neither party complains and the fact that an appeal is taken prematurely from an order, rather than a judgment, is not fatal to our jurisdiction. *Banker's Trust Co. v. Mallis*, 435 U.S. 381 (1978).

[6] 29 U.S.C. § 206(b) provides:

> Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce . . . wages at the following rate: . . . not less than the minimum wage.

State officials contend that the district court erred by concluding that the FLSA contains an implicit requirement that wages be paid promptly when due. Without arguing that payment in this case was in fact "prompt," they urge that the district court's conclusion is not supported by case law, and that the absence of a body of case law regarding prompt payment demonstrates that there is no implied prompt payment requirement. State officials also argue that since full compensation was never in doubt, and California was merely late in paying its employees, there was no violation of the FLSA. In effect, their position is that only nonpayment, not late payment, is prohibited by the Act.

Biggs and amici, on the other hand, argue that the FLSA requires paychecks to be paid on regular paydays. Therefore, in their view, late payment, as well as nonpayment, violates the Act.

A

State officials correctly point out that the FLSA does not in terms say that a minimum wage must be paid promptly. It simply says that employers "shall pay" a minimum wage. However, in construing the FLSA, we must be mindful of the directive that it is to be liberally construed to apply to the furthest reaches consistent with Congressional direction. *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959).

This case requires us to consider the obligation to pay in light of the statutory scheme as a whole. The FLSA provides for the recovery of unpaid minimum wages,

unpaid overtime compensation,[7] and liquidated damages; and has its own statute of limitations for private enforcement. These provisions necessarily assume that wages are due at some point, and thereafter become unpaid.

[1] We start with § 206(b). It directs every employer to pay the minimum wage. The obligation kicks in once an employee has done covered work in any workweek. To us, "shall pay" plainly connotes shall make a payment. If a payday has passed without payment, the employer cannot have met his obligation to "pay."

[2] Section 216(b) then provides that an employer who violates § 206 is liable to the affected employees "in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Unless there is a due date after which minimum wages become unpaid, imposing liability for both unpaid minimum wages and liquidated damages would be meaningless.

The statute must therefore contemplate a time at which § 206 is violated, or, put another way, when minimum wages become "unpaid." "Unpaid minimum wages" have to be "unpaid" as of some distinct point, otherwise courts could not compute either the amount of wages which are unpaid, or the additional "equal" amount of liquidated damages. The only logical point that wages become "unpaid" is when they are not paid at

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[7] The Act also requires employers to pay overtime compensation. 29 U.S.C. § 207(a)(1), and the provisions for liability apply to overtime as well as to a minimum wage.

the time work has been done, the minimum wage is due, and wages are ordinarily paid – on payday. *Cf. Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1579 (11th Cir. 1985) ("the employee must *actually receive* the minimum wage each pay period," emphasis original), *modified*, 776 F.2d 265 (11th Cir. 1985).

[3] Similarly, employers violating the FLSA must pay prejudgment interest on the overdue wages. *Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986) ("in the absence of a liquidated damages award, prejudgment interest is necessary to fully compensate employees for the losses they have suffered."). Prejudgment interest cannot be calculated without an amount certain owing from a day certain. As with "unpaid wages" and liquidated damages on "unpaid wages," the only logical point from which to compute the amount of interest is the day the employee's paycheck is ordinarily due. Any other time would be inconsistent with the purpose of prejudgment interest, to make it unattractive for the employer to take advantage of cash flow at the employees' expense, and to make up for the employees' loss of use of funds during the period they were due but unpaid.

[4] Finally, the FLSA contains its own statute of limitations for an action for unpaid minimum wages and for liquidated damages. 29 U.S.C. § 255(a).[8] Statutes of

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[8] Section 255(a) provides: "Any action . . . to enforce any cause of action for unpaid minimum wages, unpaid overtime, or liquidated damages . . . shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years." 29 U.S.C. § 255(a).

limitation have to start running from some point, and the most logical point a cause of action for unpaid minimum wages or liquidated damages (which are merely double the amount unpaid) accrues is the day the employee's paycheck is normally issued, but isn't. *See Beebe v. United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (FLSA claims are continuing claims and a separate cause of action "accrues" every payday that overtime is not paid); *McIntyre v. Dir. of Youth Rehab.*, 795 F. Supp. 668, 674 (D. Del. 1992) (courts have adopted uniform approach under *Beebe* that cause of action accrues each paycheck);*see also Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988) (general rule is that FLSA claims accrue at the end of each pay period); *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310, 316 (8th Cir. 1946) (accrues each payday); *accord Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir. 1981) (statute of limitations for Title VII and Age Discrimination suits runs from day employee should know employer violated law), *cert. denied*, 459 U.S. 1200 (1983).

[5] State officials urge us to distinguish between late payment and nonpayment, but offer us no principled way to make such a distinction. We cannot come up with one either. We could try to create a balancing test, as the district court did when it wrote that the FLSA "require[s] payment which is reasonably prompt under the totality of the circumstances in the individual case." Any kind of sliding scale we can think of, however, would be contrary to the statute's direction that employers shall "pay" the minimum wage and that employees are entitled to recover "unpaid" minimum wages. It also would force employees, employers, and courts alike to guess when

"late payment" becomes "nonpayment" in order to determine whether the statute of limitations has begun to run, the amount of unpaid wages and liquidated damages to be awarded, and how much prejudgment interest has been accrued. The due date, and with it when the employee actually gets paid, would become a moving target. Such a framework would contravene our obligation to construe the FLSA to the furthest reaches consistent with Congress's intent to protect employees, *Mitchell*, 358 U.S. at 211, and run counter to the purpose of the FLSA to "protect certain groups . . . from substandard wages and excessive hours." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945).

State officials nevertheless argue that the statute of limitations, prejudgment interest, and liquidated damages provisions do not need to begin on the same day at which a violation occurs. We do not see how. If employees had a right to recover only at the point of nonpayment (as opposed to late payment), but the period of limitations began running as of the employee's payday, the statute would start running before an employee had a right to recover. That cannot be correct.

State officials do not explain when or how "late payment" metamorphoses into "nonpayment" such that the Act is violated and the employer is exposed to liability for unpaid minimum wages and additional compensation by way of liquidated damages. Likewise, it is unclear on their theory how many paychecks an employee has to miss before filing suit, being able to show a violation, and recovering liquidated damages or prejudgment interest. Nor do we agree with their suggestion that a rule that paychecks are due on payday unfairly penalizes

employers who happen to be late in paying their employees. An employer who acts in good faith is not subject to liquidated damages, 29 U.S.C. § 260. While the employer remains obligated to pay overdue wages and is subject to prejudgment interest on the unpaid wages in the event of litigation, this result properly deters employers from "gamb[ling] on evading the Act" as they could if the remedy were only liability of the amount originally due. *O'Neil*, 324 U.S. at 709.

Thus, state officials' argument for why the absence of an explicit prompt payment obligation means that wages need not be paid promptly, without enhanced compensation by way of liquidated damages or prejudgment interest, is unpersuasive.

B

Holding that the FLSA is violated unless the minimum wage is paid on the employee's regular payday also comports with such case law as there is. Although not directly on point, we find it difficult to read *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945) without concluding that an employer violates the Act if payments are late. In *O'Neil*, an employee accepted a delayed payment of wages from his employer, and waived the right to receive liquidated damages. The Supreme Court held that claims for liquidated damages could not be waived. It rejected the employer's argument – similar to state officials' here – that the right to liquidated damages arises only if the employee is compelled to sue for minimum wages due, holding instead that the employer is liable for liquidated

damages in an amount equal to minimum wages "overdue" whether the employer is in default at the time suit is begun or not. 324 U.S. at 711.

O'Neil repeatedly referred to the employer's obligation to pay employees on time. For example, the court wrote that the liquidated damages provision "constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made *in the event of delay* in order to insure restoration of the worker to the minimum standard of well-being." *Id.* at 707 (emphasis added). *See also id.* (reparations are necessary for "failure to pay *on time*," emphasis added); *id.* at 709 (employee has right to "recover damages from *delay* in payment," emphasis added); *id.* at 707 n. 20 ("prompt payment to workers has long been recognized by Congress").

If, as state officials argue, late payment does not violate the FLSA, then there should have been no liquidated damages in *O'Neil* because the late payment there, though settlement, made up the difference. That the employee was entitled to recover liquidated damages even after being reimbursed to meet the minimum wage indicates that the minimum wage must be paid promptly.[9] *See also D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108,

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[9] At the time *O'Neil* was decided, liquidated damages were mandatory. 324 U.S. at 710. Since then, however, the statute has been amended to make liquidated damages discretionary, 29 U.S.C. 216(b). That change, however, does not affect *O'Neil's* analysis or ours.

116 (1946) ("the public policy of minimum wages, promptly paid, [is] embodied in the Wage-Hour Act").

State officials seek to distinguish *O'Neil* on the footing that the delay there was a long time (years), whereas here it was only a couple of weeks. *O'Neil*, however, did not rest its holding on the length of the delay. In any event, long versus short strikes us as an unworkable standard.

The Eleventh Circuit echoed *O'Neil's* holding in *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570 (11th Cir. 1985), *modified*, 776 F.2d 265 (11th Cir. 1985). Olson was a used car salesman who received weekly cash bonuses for each sale, and a sum at the end of the month also based on sales. Over five months, Olson received less than the minimum wage in three months, and more than the minimum in two. Since these two months were highly profitable, Olson's total for the five months was more than the minimum wage. Nevertheless, he argued that he deserved the difference between the minimum wage and what he received for the three months in which he was under the minimum wage.

The court adopted the government's Wage and Hour Field Operations Handbook rule, which stated that the FLSA requires "that the employee receive 'prompt payment' of the minimum wage covering all hours worked during the pay period." *Id.* at 1578. As the court wrote, "[w]e think the Act clearly requires an employee to be *paid* the minimum wage for each hour worked during the pay period." *Id.* (emphasis original). "[E]xcess commissions earned by salesmen during one pay period may be carried forward and applied to the minimum wage for

the next period *so long as the employee actually received the minimum wage for each hour worked within each separate pay period.*" *Id.* at 1579 (emphasis supplied). Consequently,

> [t]his places a duty on the employer to ensure that the employee *receives* payment of the minimum wage. A mere alteration of the employer's records that reflects excess commissions earned in the preceding period being applied toward the minimum wage for the current period will not suffice. The employee must *actually receive* the minimum wage each pay period.

Id. (emphasis original).[10]

Several other courts have also indicated that employees must be paid on payday under the FLSA. For example, in *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 491 (2d Cir. 1961), the court stated that "[w]hile the FLSA does not expressly set forth a requirement of prompt payment, such a requirement is clearly established by the authorities." Similarly, in *Donovan v. Kaszycki & Sons Contractors, Inc.*, 599 F. Supp. 860, 869 (S.D.N.Y. 1984) the court wrote that "the fact that defendants may have intended to pay the employees at some future date, or that some employees might have acquiesced, albeit grudgingly, to deferred payment, has no bearing on the fact that the statute was violated." *See also Birbalas v. Cuneo Printing Industries, Inc.*, 140 F.2d 826, 828

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[10] *Olson* was modified on rehearing, but this language remained intact. In its modification to the opinion, the court reaffirmed the "prompt payment" ruling, noting that the "employer has yet to furnish . . . any law or regulation which would permit an employer to pay an employee less than the minimum wage during a pay period." *Olson*, 776 F.2d at 267.

(7th Cir. 1944) (past due payment for overtime wages did not foreclose a suit for liquidated damages); *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943) (overtime compensation "shall be paid in the course of employment and not accumulated beyond regular payday."); *Seneca Coal & Coke v. Lofton*, 136 F.2d 359, 363 (10th Cir.), *cert. denied*, 320 U.S. 772 (1943) (FLSA violated if overtime payments not made "when due in the regular course of employment"); *accord Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1299 (3d Cir. 1991) ("liquidated damages . . . compensate employees for the losses they may have suffered by reason of not receiving their proper wages *at the time they were due*," emphasis supplied); *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944), *cert. denied*, 324 U.S. 883 (1945), (obligation to pay liquidated damages "immediately arises" when "an employer on any regular payment date fails to pay the full amount" due).

[6] We are therefore satisfied that our conclusion, that payment of minimum wages is late if not done on payday, is in line with the view of other courts.

C

[7] The Department of Labor's opinion of the statute further buttresses our holding. When faced with a problem of statutory construction, federal courts should show "great deference to the interpretation given the statute by the officers or agency charged with its enforcement." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

As Opinion Letter, No. 63 (Nov. 30, 1961) reflects, an employer sought to pay an employee less than the minimum wage during the week, and make up the difference

at the end of the month. The Department opined that this violated the FLSA. "[W]hile the Act does not require that the employee's compensation must be paid weekly, it does require the employer to pay minimum wages due for the particular work week on the regular payday for the period such work week ends." *See also* Opinion Letter, No. 1296 (Nov. 27, 1973) (employee must receive minimum wage at each paycheck); W.H. Admin. Op. (Jan. 27, 1969) ("The Act requires that employees must be paid on the regular payday.").

Our construction is also consistent with applicable federal regulations. 29 C.F.R. § 531.27(a) requires that "payments of the prescribed wages, including overtime compensation, [be made] in cash or negotiable instrument payable at par." 29 C.F.R. § 778.106 requires that overtime compensation be paid on the employee's regular payday. If overtime wages must be paid in cash or negotiable instruments on the employee's regular payday, then certainly the minimum wage must also be paid on the employee's regular payday. *See Klinghoffer,* 285 F.2d at 491.

III

State officials argue that the district court's finding that the FLSA contains a requirement that employees be paid promptly upon the end of their pay period, coupled with the order directing that the State of California must comply with such an implied requirement, is in derogation of the state's constitutional and statutory budget provisions. As the district court granted no injunctive relief, we do not understand that the state has been

ordered to comply with any requirement of the FLSA. Like any other employer, however, if it does not do so the state is exposed to liability for "unpaid minimum wages," liquidated damages or prejudgment interest. To the extent state officials contend that this exposure to damages infringes on the state's sovereignty under the Tenth Amendment, we disagree.

In *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985) the Supreme Court held that states are subject to the FLSA, overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976). And we have recently held that "Congress has made unmistakably clear its intention to apply the FLSA to the states." *Hale v. Arizona*, No. 88-15785, slip op. 4314-15 (9th Cir. May 4, 1993) (en banc).

[8] State officials argue that *Garcia* is distinguishable on its facts because applying the FLSA in that case only forced the state agency to pay its employees a minimum wage as other employers are required to do, but to apply it here would require California to pass a budget on time, a much more serious infringement of state sovereignty. Assuming state officials are correct that in the absence of a budget, the state was not legally able to pay its employees, we nevertheless find that the application of the FLSA is not preempted by the Tenth Amendment. To the extent compliance with the FLSA interferes with the state budgetary process, that interference is caused by state law, not federal law. The FLSA does not require California to pass a budget on time; it only requires California to do what all employers must do – pay its employees the minimum wage on payday. That California

has made its federal obligation dependent upon the operation of state law does not render the federal law unconstitutional.

State officials also argue that *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) and *New York v. United States*, 112 S. Ct. 2408 (1992) prohibit application of the FLSA to California. *Gregory* applied an axiom of legislative interpretation called the plain statement rule: if a Congressional statute intends to preempt the historic powers of the States, its intention must be unmistakably clear in the language of the statute. 111 S. Ct. at 2401 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)). *Gregory's* plain statement rule is satisfied here since the FLSA clearly applies to state employees such as Biggs. *Hale*, slip op. at 4314-15; 29 U.S.C. §§ 203(d)-(e).

New York held that the federal government cannot force the State of New York to regulate nuclear waste in a certain way because in doing so, Congress exceeded its Article I powers. 112 S. Ct. at 2428-29. Here, there is no dispute that the FLSA was an appropriate exercise of federal power.

IV

We therefore hold that state officials' failure to issue the class's paychecks promptly when due violates the FLSA. Paychecks are due on payday. After that, the minimum wage is "unpaid."

AFFIRMED.

TROTT, Circuit Judge Dissenting and Concurring:

As I write this opinion, major cities and towns in four Midwestern states are under water. From Montevideo, Minnesota through Minneapolis and St. Paul, from Dubuque, Des Moines, and Davenport, Iowa through Hannibal and St. Louis, Missouri, the waters of the Mississippi River and its tributaries have disrupted the lives of almost everyone living and working in the area. According to the Associated Press, 250,000 people in Des Moines are without drinking water, and 30,000 people have been flooded out of their homes in Iowa, Illinois, and Missouri. Businesses everywhere are closed. The interruption to everyday life caused by this natural disaster is similar in many respects to recent hurricanes in Florida, earthquakes in California, and drought in South Carolina: virtually everything stops except heroic efforts to survive and recover. I use this to illustrate the fact that unpredictable forces beyond anyone's control frequently invade our lives and disrupt the orderly course of everything, including the normal operation of business and commerce. These forces do not respect the calendar, payday, or the Fair Labor Standards Act. On a lesser scale, people get sick, customers declare bankruptcy, computers crash, the mail is sometimes late, and yes, states required to live by rules designed to ensure fiscal responsibility prohibit by law the release of paychecks until a budget is passed. Even federal employees are not always paid on payday. Meeting a payroll on time is not always easy or possible.

The real world notwithstanding, we now impose from the cocoon of a federal appeals court a new peril on people struggling to provide jobs for others: pay your employees before the clock strikes midnight, or you just

bought yourself a lawsuit in federal court. Floods and the like provide the rock, we now provide the hard place.

Congress has not spoken on this precise issue. All the law says is that employers shall pay their employees the minimum wage, period. Congress has not uttered a word about *when* this payment must be made. Yet, driven by a search for a "bright line," we read into the law an impractical requirement that creates a cause of action against an employer at midnight plus one second after the expiration of payday. The majority's holding says to employers, we don't care why you were late, we don't care what your reason was, the only issue now is whether liquidated damages shall be awarded. Judge Rymer says this rule does not unfairly penalize employers "who happen to be late in paying their employees." I thoroughly disagree. So will many employers. I do not dispute the idea that payment must be made in a reasonable time given the circumstances, but I do disagree with the notion that payment must be made on payday, no excuses accepted. Surely most employees of flood-ravaged employers would not take them to court to take advantage of their instant cause of action. Why? Because they too would recognize the unfairness of requiring someone to pay on time when they reasonably cannot. But it makes no sense to leave all employees at the mercy of the good will of their employers. The instant case demonstrates what can happen. Labor unrest is not uncommon.

In this respect, I believe the district court fashioned a workable rule for determining when a violation of the FLSA occurs, a rule I would adopt for this Circuit:

> The requirement of prompt payment should not be construed to impose strict liability on an employer for every delay in payment, however slight or for whatever reason. Indeed, such a result would threaten to bring about the financial ruin of many employers, seriously impair the capital resources of many others, provide a windfall to employees, and burden the court with excessive and needless litigation, all in direct contravention to the expressed intent of Congress. See 29 U.S.C. § 251(a)(1), (4) and (7). Instead, it must be interpreted to require payment which is reasonably prompt under the totality of the circumstances in the individual case. This interpretation is consistent with the long-established customs, practices, and contracts between employees and employers which Congress sought to revive in enacting the amendment to the statute. See *Id.* at § 251(a). For it has long been recognized that in the absence of a provision indicating that time is of the essence, a party is entitled reasonable time to perform. John D. Calamari & Joseph M. Perillo, *Contracts* § 11-22 at 410. (2nd ed. 1977).

Judge Rymer relies on "logic," but logic used in this sense means judgment, and judgment means reason and choice. I respectfully believe she has made the wrong choice. We don't need bright lines for everything. Sometimes they work mischief. It is ironic that we impose this bright line on employers at a time when most federal judges are publicly railing against the rigidity of federal sentencing guidelines. There is a place for bright lines, but this is not it. This is essentially a *policy* choice. Because Congress has left it to us, I would choose a more

comprehensive approach that recognizes the problems of the real world.

Those of us who live surrounded by lawsuits may not be scared of them, but well-meaning and conscientious employers – including sovereign states and their political subdivisions – are not so sanguine about mandatory costs and attorneys' fees, *See* 29 U.S.C. § 216(b), and the hassle of being hauled into court. For everyone, being a defendant in federal court is a disaster of its own kind. To the detriment of all of us, the litigation explosion continues.

The parade of litigation horribles conjured up by the majority to discredit reasonable flexibility is simply false. Trial courts and judges are well equipped to deal with yielding rules. We do it all the time. For example, the statute of limitations clock does not start to tick against an injured employee eligible for a disability award under the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. § 901 et. seq., until the employee becomes "aware of the full character, extent and impact of the harm done to him." *Todd Shipyards v. Allan*, 666 F.2d 399, 401 (9th Cir.) (emphasis omitted), *cert. denied*, 459 U.S. 1034 (1982). No bright line here. This is just a matter of fairness and common sense. *See also Abel v. Director, OWCP*, 932 F.2d 819 (9th Cir. 1991). Ironically, one of the cases cited by the majority cuts against its reasoning. In *Aronsen v. Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981), we rejected the use of a bright-line statute of limitations formula in favor of a test based on when an employee "knows or should know that an unlawful employment practice has been committed." *Id.* at 593. We said, "Judicial review in each case cannot be facilitated by bright-

line approaches because, as the court has indicated, such formulae tend to obscure and even distort congressional intent." *Id.* The only congressional intent I can readily discern from the FLSA is the intent to insure the payment of minimum wages, not that payment be made on payday come hell or high water, or else. I quote the Supreme Court:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706-07 (1945) (footnotes omitted).

I disagree with the majority that the district court's test would require us to "guess" when late payment becomes nonpayment and when the statute of limitations starts to run. Trial courts would no more "guess" at this than anything else they decide. I have no doubt that we easily could apply the district court's test in FLSA cases without damaging the purpose of Congress in enacting this law.

The majority's holding also undercuts 29 U.S.C. § 260, which allows an employer to escape the clutches of

liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith *and* that *he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]. Id.* (emphasis added). If payment must be made on payday, period, no excuses allowed, how could a flooded-out employer ever show he had reasonable grounds to *believe* his failure to pay on payday "was not a violation" of the Act? The majority's failure to appreciate the ramifications of its brightline rule on this issue and likewise to provide guidance to district courts is lamentable.

So, to employers in the Ninth Circuit, beware. No matter what you excuse, good or not, the next earthquake, fire, drought, death or illness, bankruptcy, flood, computer failure, or fiscal crisis may land you without a defense in federal court, especially if you are not on friendly terms with your employees.

Nevertheless, I concur in the outcome in this case because California understandably passed up its opportunity to demonstrate to the district court that its delay in payment was reasonable, preferring instead to argue that the statute only prohibits nonpayment, not late payment. I characterize California's litigation position as "understandable" because it is true that the statute we construe says absolutely nothing about the timing of payments. Thus, although I disagree with the majority's draconian rule, I concur in the result of this appeal.

29 U.S.C. § 206. Minimum Wages

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees. Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $3.35 an hour during the period ending March 31, 1990, not less than $3.80 an hour during the year beginning April 1, 1990, and not less than $4.25 an hour after March 31, 1991;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator [Secretary], or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality

of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rates; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint pursuant to sections 5 and 8 [29 U.S.C. §§ 205, 208]. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the

direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Additional applicability to employees pursuant to subsequent amendatory provisions. Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 [29 USCS §§ 203, 206, 207, 213, 214, 216, 218, 255], title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

(c) Employees in Puerto Rico.(1) The rate or rates provided by subsection (a)(1) shall be applicable in the case of any employee in Puerto Rico who is employed by –

(A) the United States,

(B) an establishment that is a hotel, motel or restaurant,

(C) any other retail or service establishment that employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs, or

(D) any other industry in which the average hourly wage is greater than or equal to $4.65 an hour.

(2) In the case of any employee in Puerto Rico who is employed in an industry in which the average hourly wage is not less than $4.00 but not more than $4.64, the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1994, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection(a)(1) shall apply on April 1, 1994.

(3) In the case of an employee in Puerto Rico who is employed in an industry in which the average hourly wage is less than $4.00, except as provided in paragraph (4), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1995, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1995.

(4) In the case of any employee of the Commonwealth of Puerto Rico, or a municipality or other

governmental entity of the Commonwealth, in which the average hourly wage is less than $4.00 an hour and who was brought under the coverage of this section pursuant to an amendment made by the Fair Labor Standards Amendments of 1985 (Public Law 99-150), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1996, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1996.

(d) Prohibition of sex discrimination. (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or

attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes].

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, or dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States. (1) Notwithstanding the provisions of section 13 of this Act [29 USCS § 213] (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 USC 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 13 of this Act [28 USCS § 213] (except subsection (a)(1) and (f) thereof) and the provisions of Service Contract Act of 1965 [41 USCS §§ 351-357], every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Employees in domestic service. Any employee –

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) [subsec. (b) this section] unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act [42 USCS § 409(a)(6)] constitute wages for the purposes of title II of such Act [42 USCS §§ S401 et seq.], or

(2) who in any workweek –

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b) [subsec. (b) this section].

(June 25, 1938, ch 676,§ 6, 52 Stat. 1062; June 26, 1940, ch 432,§ 3(e), (f), 54 Stat. 616; Oct. 26, 1949, ch 736,§ 6, 63 Stat. 912; Aug. 12, 1955, ch 867, § 3, 69 Stat. 711; Aug. 8, 1956, ch 1035, § 2, 70 Stat. 1118; May 5, 1961, P.L. 87-30,§ 5, 75 Stat. 67; June 10, 1963, P. L. 88-38, § 3, 77 Stat. 56; Sept. 23, 1966, P. L. 89-601, Title III, §§ 301-305, 80 Stat. 838-841; April 8, 1974, P. L. 93-259, §§ 2-4, 5(b), 7(b)(1), 88 Stat. 55, 56, 62; Nov. 1, 1977, P. L. 95-151, § 2(a)-(c), (d)(1), (2), 91 Stat. 1245; Nov. 17, 1989, P. L. 101-157,

* * *

29 U.S.C.S. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] by the Fair Labor Standards Amendments of 1966 –

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed –

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be

guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if –

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

> and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6 [29 USCS § 206],

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) [Repealed]

(d) [Repealed]

(e) "Regular rate" defined. As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include –

> (1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
>
> (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are

not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator [Secretary] set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator [Secretary]) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the

maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)[)], where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

(f) Employment necessitating irregular hours of work. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such

employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 [29 USCS § 206(a) or (b)] (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection –

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during non-overtime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator [Secretary] as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation creditable toward overtime compensation. Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment. No employer shall be deemed to have violated subsection (a) by employing any employee at a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6 [29 USCS § 206], and (2) more than half his compensation for a representative period (not less than one month)

represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged, or mentally ill. No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –

(1) in a work period of 28 consecutive days the employee receives for [sic] tours of duty which in

the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) [29 USCS § 213 note] in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for [sic] tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households. No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) Employment in tobacco industry. For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee –

(1) is employed by such employer –

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for –

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban, or interurban electric railway, or local trolley or motorbus carrier. In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time. (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only –

(A) pursuant to –

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for

hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than –

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher [.]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency –

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection –

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution. (1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection,

law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency –

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political

subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education. Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is –

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(June 25, 1938, ch 676, § 7, 52 Stat. 1063; Oct. 29, 1941, ch 461, 55 Stat. 756, July 20, 1949, ch 352, § 1, 63 Stat. 446; Oct. 26, 1949, ch 736, §§ 7, 16(f), 63 Stat. 912, 920; May 5, 1961, P. L. 87-30, § 6, 75 Stat. 69; Sept. 23, 1966, P. L. 89-601, Title II, §§ 204(c), (d), 212(b), Title IV, §§ 401-403,

80 Stat. 835-837, 841, 842; April 8, 1974, P. L. 93-259, §§ 6(c)(1)(A), 7(b)(2), 9(a), 12(b), 19(a)-(c), 21(a), 88 Stat. 60, 62, 64, 66, 68; Nov. 13, 1985, P. L. 99-150, §§ 2(a), 3(a), (b), (c)(1), 99 Stat. 787, 789; Nov. 17, 1989, P. L. 101-157, § 7, 103 Stat. 944.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WILLIAM BIGGS; et al.,

Plaintiffs,

v.

PETE WILSON, Governor; KATHLEEN BROWN, Treasurer; GRAY DAVIS, Controller; A.A. PIERCE, Interim Director of the California Department of Transportation,

Defendants.

NO. CIV. S-90-0942-WBS/GGH

MEMORANDUM AND ORDER

(Filed Oct. 3, 1991)

This is an action to recover damages as well as declaratory and injunctive relief based on alleged violations of the Fair Labor Standards Act (FLSA). Jurisdiction is based on 28 U.S.C. § 1331.

Plaintiffs are highway maintenance workers employed by the State of California, Department of Transportation (hereinafter CalTrans). As a result of the 1990 budget impasse plaintiffs were not paid on the scheduled payday, July 16, 1990. The State withheld the checks contending, under state law, that payroll checks could not be released for the fiscal year until a budget was approved by the Legislature and signed by the Governor. On July 28, 1990, the Legislature passed the 1990 budget. Former Governor Deukmejian signed the budget

on July 31, 1990. CalTrans workers received their paychecks for the July 16 payroll, totalling $5,620,313.41, on July 30 and 31, 1990.

Both sides have moved for summary judgment under Fed. R. Civ. P. 56. In order for the court to grant either party's motion there must exist no genuine issues of material fact and one of the parties must be entitled to judgment as a matter of law. *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986).

The first issue to be decided is whether the FLSA requires that wages be paid promptly when due. The FLSA expressly requires that an employer pay each employee, regardless of sex, a minimum wage set by the Act, 29 U.S.C. § 206, and overtime compensation for hours worked in excess of 40-hours per week, 29 U.S.C. § 207, and regulates the use of child labor. 29 U.S.C. § 212. Nowhere does it expressly require that wages be paid promptly or by a date certain. The question is whether such a requirement is implicit in the Act.

When circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed, courts should endeavor to give statutory language that meaning which nurtures the policies underlying the legislation. *United States v. Sisson*, 399 U.S. 267, 297-98 (1970). The legislative history of the FLSA shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945). A judicial pronouncement that there is no requirement that the worker be paid on

time would leave the worker totally unprotected and subject to the whims of the employer as to when wages would be paid. Such a result would be inconsistent with the objectives of the Act which include the elimination of labor conditions detrimental to the *maintenance* of a minimum standard of living necessary for the health, efficiency, and general well-being of employees. *Fleming v. Cudahy Packing Co.*, 41 F. Supp. 910 (S.D. Cal.1941).

Moreover, the liquidated damage clause of 29 U.S.C. § 216(b) "constitutes a Congressional recognition that the failure to pay the statutory minimum *on time* may be so detrimental to the *maintenance* of the minimum standard of living 'necessary for the health, efficiency and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay. . . . " *Brooklyn Savings Bank*, 324 U.S. at 707. [Emphasis added.][1]

Surprisingly, no cases have been brought to the court's attention which deal directly with the issue before the court.[2] Defendants argue that if Congress had

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[1] This case was decided before Congress amended the FLSA in 1947 to allow judges to exercise discretion in awarding liquidating damages. Thus much of the language speaks to the mandatory nature of liquidated damages under the Act. However the subsequent amendment of the Act does not affect the validity of these cases as support for the proposition that the FLSA contains an implied requirement of prompt payment.

[2] Plaintiff asserts that a similar issue was presented in *United States v. Klinghoffer Bros.*, 285 F.2d 487 (2d Cir. 1966). That case held that "[w]hile the FLSA does not expressly set forth a requirement of prompt payment, such a requirement is clearly established by the authorities, and codified in interpretative

intended and the Department of Labor had interpreted the FLSA to implicitly include a requirement of prompt payment, there would be no shortage of cases in this area. This absence of case authority, however, cannot be regarded as support for the contention that there is no such requirement implicit in the FLSA. Where the meaning of the statute cannot be determined convincingly from the statute itself, the stated policy of the Act, or its legislative history, the court must look to judicial pronouncements in cases which are not without pertinency. *Wirtz v. TiTi Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir.), *cert. denied*, 389 U.S. 834 (1967). Albeit in dicta, the courts have, on previous occasion, read into the Act a requirement of prompt payment. This court must give appropriate weight to those judicial pronouncements.

In *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 115, (1946)[3] the Supreme Court reaffirmed that "The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by [the] failure *to pay on time* must be made to accomplish Congressional purposes." (Quoting from *Brooklyn Savings Bank*, 324 U.S. at 708.) [Emphasis added].

Also, in *Atlantic Co. v. Broughton*, 146 F.2d 480, 481-482, (5th Cir. (1944),[4] the Fifth Circuit stated:

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regulation, 29 C.F.R. 777.2(a) . . . " *Id.* at 491. However, the regulation upon which that opinion is based does not appear in the Code of Federal Regulations, thus leading the court to conclude that it has been repealed.

[3] See footnote 1.

[4] See footnote 1.

> . . . if an employer *on any regular payment date fails to pay* the full amount of the minimum wages and overtime compensation due an employee, there immediately arises an obligation upon the employer to pay the employee the difference between the wages paid and the wages due, plus an equal additional amount as liquidated damages . . . (emphasis added).

The *Schulte* Court was addressing, and condemning, compromises of real disputes over coverage under the FLSA which do not require the payment in full of unpaid wages and liquidated damages. However, the policy implications which are stated in the opinion are applicable in the instant case. The FLSA was intended to protect the worker whom Congress regarded as having unequal bargaining power. That protection must necessarily extend to the employee who is not paid his wages on the date due.

In requiring that employees be paid minimum wages, the FLSA surely must contemplate that those wages be paid promptly when due. Suppose that instead of being withheld for two weeks, the wages had been withheld for two months or even two years. During those months or years the employees would not receive the minimum wage – they would receive no wage at all. Clearly this is not what the Act contemplates. Therefore, in the absence of any authority to the contrary and in accord with the policy considerations which prompted Congress to enact the FLSA and the pronouncements of the Supreme Court, this court finds that the Act contains an implied requirement that wages be paid promptly when due.

The requirement of prompt payment should not be construed to impose strict liability on an employer for every delay in payment, however slight or for whatever reason. Indeed, such a result would threaten to bring about the financial ruin of many employers, seriously impair the capital resources of many others, provide a windfall to employees, and burden the court with excessive and needless litigation, all in direct contravention to the expressed intent of Congress. See 29 U.S.C. § 251(a)(1), (4) and (7). Instead, it must be interpreted to require payment which is reasonably prompt under the totality of the circumstances in the individual case. This interpretation is consistent with the long-established customs, practices, and contracts between employees and employers which Congress sought to revive in enacting the amendment to the statute. See *Id.* at § 251(a). For it has long been recognized that in the absence of a provision indicating that time is of the essence, a party is entitled reasonable time to perform. John D. Calamari & Joseph M. Perillo, *Contracts* § 11-22 at 410. (2nd ed. 1977).

Defendants do not argue that plaintiffs received their paychecks for the July 16 payroll promptly. Rather they argue that the FLSA contains no express or implied requirement of prompt payment and that issuance of plaintiffs' paychecks in the absence of a budget would have been illegal under their interpretation of state law. The record shows that the responsible state officials elected voluntarily and unnecessarily to withhold payment of plaintiffs' wages when due. In light of these circumstances, the court finds that the wages due to plaintiffs on July 16 were not paid with reasonable promptness as required by the FLSA.

The second issue to be decided is whether the requirement of the FLSA that wages be paid with reasonable promptness violates the tenth amendment or the state sovereignty doctrine when applied to the State of California. Defendants contend that plaintiffs did not receive their mid-month paychecks on the regularly-scheduled payday because warrants cannot be drawn on the state treasury and issued by the Controller until an appropriation has been made by the Legislature. *Stanson v. Mott*, 17 Cal.3d 206, 216 (1976). Plaintiffs counter that the state is authorized by its own statues [sic] to make payments for payroll purposes in the absence of a budget. The court does not reach this issue because irrespective of which interpretation of the state law is state law is correct, the lack of a budget does not overcome the operation of the supremacy clause of the United States Constitution, Art. VI, § 2. If this requirement of prompt payment under the FLSA is in conflict with California state law the FLSA must prevail.

A finding that prompt payment is implicit in the FLSA is not precluded by the tenth amendment or the doctrine of state sovereignty. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985). (" . . . we perceive nothing in the overtime and minimum-wage requirements of the FLSA . . . that is destructive of state sovereignty or violative of any constitutional provision").

While conceding the applicability of *Garcia*, defendants contend that a different situation is presented in the instant case, in that if a requirement to pay employees immediately at the end of the pay period is read into the FLSA, the enforcement of such a requirement would be in

derogation of the state's constitutional and statutory provisions regarding the budget process. Defendants argue that a prompt payment requirement would interfere with state sovereignty with regard to a state's own internal operations, including matters of budgeting and personnel administration. However, "The Court in *Garcia* specifically reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'." *Bratt v. Los Angeles County*, 912 F.2d 1066, 1072 (9th Cir.), *cert. denied*, ___ U.S. ___ (1990) citing *Garcia*, 469 U.S. at 546-47. This court will not resurrect the line of reasoning laid to rest by *Garcia*.

Liquidated Damages

Section 216(b) of Title 29 U.S.C. provides that

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . .

Since plaintiffs have now been paid the wages, they seek to recover not the wages themselves but an additional equal amount as liquidated damages.

Section 260 of Title 29 U.S.C. provides that

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or

> liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

An employer has the burden of showing that the violation of the FLSA was in good faith and that the employer had reasonable grounds for believing that no violation took place. *Equal Employment Opportunity Comm'n v. First Citizens Bank*, 758 F.2d 397, 403 (9th Cir.), *cert. denied*, 474 U.S. 902 (1985).

The courts have interpreted § 260 as providing for a two part inquiry. *See Bratt v. Los Angeles County*, 912 F.2d at 1072. The first part is a subjective inquiry into the employer's good faith through an examination of whether it had "an honest intention to ascertain what [the FLSA] requires and to act accordingly". *Id.* The second is an objective test of whether the employer had reasonable grounds for believing that its conduct complies with the Act. *Id.* These are mixed questions of law and fact. *Id.* at 1071 *citing* 29 C.F.R. § 790.22(c) (1987).

Plaintiffs have chosen not to sue their employer, the State of California, in this action. Instead, they have sued only the Governor, the Treasurer, the Controller, and the

Director of the Department of Transportation.[5] For this reason alone plaintiffs' request for liquidated damages must be denied. Section 216(b) imposes liability for liquidated damages upon the employer who violates sections 206 or 207; it imposes no liability upon the officers of the employer.

Furthermore, defendants have produced evidence of the state's efforts to comply with FLSA including a signed declaration of Bruce N. Cain [sic, Crain] who in his professional capacity as an employee in the State of California's Department of Personnel Administration in the Policy Development Division attests to the state's extensive efforts to devise a policy which came within compliance of the Act. Those efforts reflect an honest intention to ascertain the requirements of the FLSA and to act accordingly. Moreover, the State had reasonable grounds for believing that its conduct complied with the Act because neither statutes, the applicable regulations nor the cases directly address the issue of prompt payment in the face of a state budget impasse. This case appears to be one of first impression. Therefore, in the exercise of its discretion the court would decline to award liquidated damages in this case.

In the absence of a liquidated damage award, prejudgment interest is necessary to fully compensate employees for the losses they have suffered, however.

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[5] By operation of F.R.Civ.P. 25(d) defendants Pete Wilson, Kathleen Brown, and A.A. Pierce Sels have been substituted for defendants George Deukmejian, Thomas Hayes, and Robert K. Best as Governor, Treasurer and Director of the California Department of Transportation respectively.

Ford v. Alfare, 785 F.2d 835, 842 (9th Cir. 1986). Plaintiffs are therefore entitled to interest on the amounts due them from July 16, 1990 to July 30 and 31, 1990.

Injunctive Relief

The basis for injunctive relief in the federal courts is irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Plaintiffs have been paid the amounts withheld due to the budget impasse. Therefore there is no immediacy of harm that would warrant injunctive relief. Neither is there evidence to indicate that any harm which might result from the failure to issue a permanent injunction could not be redressed by the legal remedies provided for in the FLSA. Accordingly, the court declines to grant plaintiffs' request for injunctive relief.

Declaratory Relief

Plaintiffs also seek a declaration that defendants' failure to issue pay checks promptly violates the FLSA, the United States Constitution, and the California Constitution. Declaratory relief is often an effective alternative to injunctive relief on a lesser showing. *Tierney v. Schwieker*, 718 F.2d 449, 457 (D.C. Cir. 1983). Faced with an analogous situation involving the refusal to release funds for the Aid to Families with Dependent Children program due to the same budget impasse, Judge Levi recently granted declaratory relief, pointing out that the dispute which occurred over the budget impasse is likely to recur. See *Pratt v. Wilson*, ___ F. Supp. ___, 1991 WL 130614 (E.D. Cal. 1991). The court concludes that similar relief is

appropriate here. If and when the state should again find itself without a budget, the defendants and other responsible state officials are entitled to know their obligations under the FLSA. Since the court finds that the failure to issue the checks promptly when due violates the FLSA, it is unnecessary to reach plaintiffs' contention that it violates the United States Constitution or the California Constitution.

IT IS THEREFORE DECLARED that defendants' failure to issue plaintiffs' paychecks promptly when due violates the Fair Labor Standards Act.

IT IS FURTHER ORDERED that plaintiffs' request for liquidated damages be, and the same is, hereby denied.

IT IS FURTHER ORDERED that plaintiffs' request for interest at the legal rate on the unpaid wages withheld from July 16, 1990 to July 30 and 31, 1990 is granted.

IT IS FURTHER ORDERED that plaintiffs' request for costs, including reasonable attorneys fees, is granted. Plaintiffs shall comply with the procedures set forth in Local Rules 292 and 293.

DATED: October 3, 1991

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 22 1993

No. 93-772

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PETE WILSON, Governor of the State of California;
JAMES W. VAN LOBEN SELS, Director of the
California Department of Transportation,
Petitioners,

v.

WILLIAM BIGGS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
ARGUMENT	1
Introduction	1
A. The Decision Below Correctly Applies Well-Established FLSA Law	2
B. There Is No Federalism Concern That Calls For An Interpretation Of The FLSA In This Case That Deviates From Well-Established FLSA Law	9
C. The Instant Case Presents No Substantial Intrusions Into Federalism Interests That Would Justify Any Reconsideration Of This Court's *Garcia* Decision	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

Atlantic Co. v. Broughton, 146 F.2d 480 (5th Cir.), *cert. denied*, 324 U.S. 883 (1945) 2
Beebe v. United States, 640 F.2d 1283 (Cl. Ct. 1981) 5
Birbalas v. Cuneo Printing, 140 F.2d 826 (7th Cir. 1944) 2
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) 4, 5, 6, 12
Calderon v. Witvoet, 999 F.2d 1101 (7th Cir. 1993) 3
Cook v. United States, 855 F.2d 848 (Fed. Cir. 1988) 5
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 9, 12
Gregory v. Ashcroft, —— U.S. ——, 59 L.W. 4714 (1991) 9, 10, 11
Martin v. Selker Brothers, 949 F.2d 1286 (3d Cir. 1991) 3
Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310 (8th Cir. 1946) 5
Moreau v. Klevenhagen, —— U.S. ——, 59 L.W. 4714 (1991) 10, 11
New York v. United States, —— U.S. ——, 60 L.W. 4603 (1992) 11
Olson v. Superior Pontiac-GMC, Inc., 765 F.2d 1570, *modified on other grounds*, 776 F.2d 265 (11th Cir. 1985) 3
Planned Parenthood v. Casey, —— U.S. ——, 60 L.W. 4795, 4801 (1992) 12
Rigopoulos v. Kervan, 140 F.2d 506 (2d Cir. 1943) 2
Seneca Coal & Coke Co. v. Lofton, 136 F.2d 359 (10th Cir.), *cert. denied*, 320 U.S. 722 (1943) 2
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 12
Udall v. Tallman, 380 U.S. 1 (1965) 3
United States v. Klinghoffer Brothers, 285 F.2d 487 (2d Cir. 1961) 3

TABLE OF AUTHORITIES—Continued

STATUTORY MATERIALS	Page
Age Discrimination Employment Act, 29 U.S.C. §§ 621-634	9
Cal. Gov't Code § 13332	14
Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*	*passim*
29 U.S.C. § 202(a)	5
29 U.S.C. §§ 203(d), (e) & (x)	9
29 U.S.C. § 207(o)	11
29 U.S.C. § 216(b)	5
29 U.S.C. § 255(a)	5
29 U.S.C. § 260	6, 7
Fair Labor Standards Amendment Act of 1985, P.L. 99-150; 99 Stat. 790 (1985)	10
1983 Cal. Legis. Serv., Ch. 323, ¶ 19.5, p. 1755	14
ADMINISTRATIVE MATERIALS	
29 C.F.R. § 778.106 (1992)	4
Wage-Hour Opinion Letter No. 63 (November 30, 1961) *reprinted in* [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,581)]	4
Wage-Hour Opinion Letter No. 942 (January 27, 1969) (*reprinted in* [1966-1969 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,954)	4
Wage-Hour Opinion Letter No. 1296 (November 27, 1973) (*reprinted in* [1973-1978 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,900)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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PETE WILSON, Governor of the State of California;
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

ARGUMENT

Introduction

The district court and the court of appeals both ruled that, under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, a covered employer—whether public or private—must make timely payments to covered employees of their wages as provided for in the Act at the conclusion of their pay period. In the circumstances here, both courts ruled that because the employer did not meet that statutory duty, the employees were entitled to declaratory relief, prejudgment interest on their deferred compensation, and reasonable attorneys fees. At the same

time, the lower courts *denied* the employees' requests for liquidated damages and for injunctive relief. Pet. App. 59-63.

The *certiorari* petition argues that the decisions below present a novel question of statutory construction, that the courts below answered that question incorrectly, and that their ruling works an unconstitutional intrusion into the rights of the states under the Tenth Amendment. As we now show, none of these points is well taken. The decision below simply follows well settled law, correctly applies that law to uncontested facts, and does so without working any intrusion into the constitutional rights of the states.

A. The Decision Below Correctly Applies Well-Established FLSA Law.

Petitioners mischaracterize the decision below as "a case of first impression." Petition for a Writ of Certiorari ("Pet.") at 7. In fact, that decision rests on an FLSA "timely payment" requirement that has been uniformly recognized for decades.

1. Over the past fifty years, every circuit that has examined the question has concluded that the FLSA requires a covered employer to pay to its covered employees their statutorily prescribed compensation "when due in the regular course of employment." *Seneca Coal & Coke Co. v. Lofton*, 136 F.2d 359, 363 (10th Cir.), *cert. denied*, 320 U.S. 722 (1943). *Accord, Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943) (FLSA "plainly contemplates that overtime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day"); *Birbalas v. Cuneo Printing*, 140 F.2d 826, 828 (7th Cir. 1944) ("failure to pay [compensation] when due, was a violation"); *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944), *cert. denied*, 324 U.S. 883 (1945) ("if an employer on any regular payment date fails to pay the full amount of the minimum wages and overtime compensation due to an employee,

there immediately arises" a violation); *United States v. Klinghoffer Bros.*, 285 F.2d 487, 491 (2d Cir. 1961) ("prompt payment . . . requirement is clearly established by the authorities"); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1578 (11th Cir. 1985) (FLSA requires "that the employee receive 'prompt payment' of the minimum wage covering all hours worked during the pay period. . . . The employee must *actually receive* the minimum wage each pay period."), *modified on other grounds*, 776 F.2d 265, 267 (reasserting that employer may not "defer compensation" if doing so would result in "pay[ing] an employee less than the minimum wage during a pay period"); *Martin v. Selker Bros.*, 949 F.2d 1286, 1299 (3d Cir. 1991) (FLSA requires payment of "proper wages at the time they were due"); *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993) ("the FLSA requires timely payment . . . [and prohibits] deferred payment" of statutory wages). *See generally* Pet. App. 12-16 (discussing cases).

The Petition wholly ignores this uniform line of authority, despite its obvious relevance, and despite the court of appeals' citation of the cases just noted. Pet. App. 14-16.

2. The Department of Labor's long-standing interpretation of the FLSA—an interpretation that is entitled to "great deference" since the Department is the agency charged by Congress with the FLSA's enforcement, *Udall v. Tallman*, 380 U.S. 1, 16 (1965)—is to the same effect.

In 1961, the Department issued a formal opinion letter regarding the legality of an employer's decision to defer payments of wages, as prescribed by the FLSA, beyond the employees' regular payday. The Department's interpretation of the Act could not have been clearer:

> [T]here is no requirement that compensation must be paid weekly. However, the minimum wage due for a particular workweek must be paid on the regular payday for the period in which such workweek ends.

> . . . The employee is due in full on each regular payday the compensation which would at least equal the minimum wage applicable under the Act. Wage-Hour Opinion Letter No. 63 (November 30, 1961) (*reprinted in* [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,581).]

And, the Department has repeatedly reaffirmed this view in subsequent opinion letters and regulations. *See* Wage-Hour Opinion Letter No. 1296 (November 27, 1973) (*reprinted in* [1973-1978 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,900) (two week delay in FLSA wage payments beyond normal payday would violate Act); Wage-Hour Opinion Letter No. 942 (January 27, 1969) (*reprinted in* [1966-1969 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,954 ("[t]he Act requires that employees must be paid on the regular payday"); 29 C.F.R. § 778.106 (1992) (overtime compensation must be paid by employees' regular payday).

As was true with respect to the court of appeals jurisprudence, the Petition wholly ignores the Department's rulings despite their obvious relevance, and despite the Ninth Circuit's express reliance on these rulings. Pet. App. 16-17.

3. The court of appeals decisions and Labor Department's rulings just noted are fully supported by this Court's decision in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).

The *Brooklyn Savings Bank* case involved an FLSA action brought by an employee whose employer had failed to pay overtime compensation in a timely manner, but had, prior to the commencement of the action, paid all back wages due, albeit without any interest or other enhancement to account for the lateness of payment. When the employee brought an action seeking liquidated damages under the Act, the employer argued—as petitioners argue in this case—that the late payment of

FLSA wages is not in itself a violation and that the Act is violated "only if the employee is compelled to sue for minimum wages due." 324 U.S. at 711.

The Court squarely rejected this argument, holding that an employer's refusal to pay FLSA wages when those wages become due—and to instead delay the payment of such wages—constitutes a violation of the Act. As the Court explained, the Act's provision for such recoveries "constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that [such enhancements as liquidated damages] must be made *in the event of delay* in order to insure restoration of the worker to that minimum standard of well-being." 324 U.S. at 707 (emphasis added; *quoting* FLSA § 2(a), 29 U.S.C. § 202(a)).[1]

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[1] The FLSA's allowance of liquidated damages is only one of several aspects of the Act that make clear that there is a timely payment requirement. For example, the Act's statute of limitations provision refers to a point in time after which an FLSA action "accrue[s]," 29 U.S.C. § 255(a). As the court below put it, such a limitations provision must "start running from some point, and the most logical point a cause of action for unpaid minimum wages or liquidated damages . . . accrues is the day the employee's paycheck is normally issued, but isn't." Pet. App. 10. *See* to the same effect, *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988); *Beebe v. United States*, 640 F.2d 1283, 1293 (Cl. Ct. 1981); *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310, 316 (8th Cir. 1946).

Similarly, the Act's remedial provision (allowing prejudgment interest for "unpaid" wages, 29 U.S.C. § 216(b)), also requires the determination of a date after which wages are considered "unpaid." As the court below noted, wages must be considered "unpaid as of some distinct point, otherwise courts could not compute" proper remedies. Pet. App. 8. And, "[t]he only logical point that wages become 'unpaid' is when they are not paid at the time the work has been done, the minimum wage is due, and wages are ordinarily paid —on payday." *Id.* at 9.

Brooklyn Savings Bank controls this case. That decision leaves no doubt that the FLSA requires employers to pay the statutorily required wage *on a regular and timely basis* and ensures to employees that relief will be available should an employer refuse to make such timely payments.[2]

Once again, the Petition does not even mention *Brooklyn Savings Bank* even though the Ninth Circuit expressly relied upon its holding and reasoning. *See* Pet. App. 11-14.

4. While the Petition is light on the relevant legal materials, it is heavy on apocalyptic rhetoric warning of the potentially "disastrous consequences" of the decision below. Pet. App. 9. That decision has no such potential.

a. The Petition insists that "[t]he Ninth Circuit has fashioned a rule" under which "an employer who is even *one day late* in making payroll will be *automatically* penalized under the liquidated damages provisions of the FLSA in an amount of 100 percent of that portion of the employee's wages that represents the minimum wage." Pet. 9 (emphasis in original; *citing* 29 U.S.C. § 260). And this will occur, petitioners warn, even when "[d]elays in making payroll" occur because of "natural disasters, death or illness, computer failure, late mail, bank-

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[2] At the time the Court decided *Brooklyn Savings Bank*, an award of liquidated damages was mandatory upon a finding of a violation. In 1947, however, Congress created a qualified "good faith" defense to liability for liquidated damages. 29 U.S.C. § 260. The district court below, in part relying on this qualified defense, denied the employees' request for liquidated damages, and instead awarded prejudgment interest as the means of compensating the employees for the late payments.

Obviously, neither the 1947 amendment, nor the denial of liquidated damages in this case, in any way affects the relevance of *Brooklyn Savings Bank*. These distinctions relate to the precise forms of relief available to compensate for the late payment of FLSA wages, not to the legal principle that employees who suffer late payments have suffered a violation of the Act and may seek appropriate compensatory relief.

ruptcy, or fiscal crises." *Id.* The decision below is exactly to the contrary.

The district court *denied* the employees' request for a liquidated damages award in this case. *See* Pet. App. 59-63; *see also* 29 U.S.C. § 260 (allowing for qualified "good faith" defense to liquidated damages request). Instead, the district court awarded *only* prejudgment interest. And, the court of appeals decision expressly rejected the argument that the "timely payment" rule would result in "automatic" liquidated damages awards against faultless employers:

> Nor do we agree with [the employer's] suggestion that a rule that paychecks are due on payday unfairly penalizes employers who happen to be late in paying their employees. An employer who acts in good faith is not subject to liquidated damages, 29 U.S.C. § 260. . . . [T]he employer remains obligated to pay overdue wages and is subject to prejudgment interest on the unpaid wages in the event of litigation. . . . [Pet. App. 12.][3]

In sum, all that the decision below requires of a reasonable, faultless employer who does not make the timely payment of wages as provided for in the FLSA is interest on the late payment. Both common sense and over 45 years of experience make it plain that such a requirement is no threat to employers, be they public or private.

b. Equally to the point, while the Petition stresses the needs of "reasonable" and "faultless" employers who do

[3] To be sure, petitioners attack the court of appeals decision for its assurance that "faultless" employers acting in "good faith" will not be liable for liquidated damages, insisting that the liquidated damages provision is far less flexible than the court of appeals said it is. On that premise, petitioners urge that late payments be allowed under the statute in order to avoid the result of unreasonable awards of liquidated damages. *See* Pet. 9-10.

In essence, this is an argument that the decision below should be reviewed and reversed in order to foreclose an untoward result that the courts below never reached.

not meet a payday, petitioners, in the courts below, did *not* argue for an FLSA rule on late payment that makes any distinctions based on "fault" or "reasonableness." Instead, petitioners argued that the FLSA imposes *no* requirements whatsoever regarding the timely payment of wages.

Virtually all of the Petition's arguments regarding "faultless" or "reasonable" employer delays in wage payments were voiced below in the separate opinion of Circuit Judge Trott. *See* Pet. App. 20-25. But, as Judge Trott explained, in *this* case petitioners "passed up [the] opportunity to demonstrate to the district court that [the] delay in payment was reasonable, preferring instead to argue that the statute only prohibits nonpayment, not late payments." Pet. App. 25. Accordingly, Judge Trott —who agreed that the FLSA *does* prohibit late payments, even if it also accounts for the interests of "faultless" and "reasonable" employers—"concur[red] in the outcome of this case." *Id.*[4]

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[4] The disagreement below between the court of appeals majority and the separate opinion of Judge Trott was not over whether the FLSA contains a "timely payment" requirement (all agreed that it does); nor was the dispute over the outcome of the case (all agreed that petitioners are liable for violating the FLSA "timely payment" requirement). Rather, that disagreement concerned the details of precisely how the FLSA's "timely payment" requirement should be applied.

The court of appeals majority adopted the view that a violation of the FLSA occurs whenever an employer fails to pay required wages on a regular payday. *See, e.g.*, Pet. App. 19. In contrast, Judge Trott argued that the FLSA requires "payment which is reasonably prompt under the totality of the circumstances," which was the standard that the district court had adopted. Pet. App. 22 (*quoting* district court; *see* Pet. App. 57). As noted in text, the majority and Judge Trott agreed that, under either approach, petitioners violated the FLSA "timely payment" requirement. *See also id.* at 57 (district court finding that "[t]he record shows that responsible state officials elected voluntarily and unnecessarily to withhold payment . . . [and that therefore] wages due . . . were not paid with reasonable promptness").

B. There Is No Federalism Concern That Calls For An Interpretation Of The FLSA In This Case That Deviates From Well-Established FLSA Law.

Petitioners argue that "[t]he Ninth Circuit's conclusion . . . "is plainly in error in light of *Gregory* [*v. Ashcroft*, —— U.S. ——, 59 L.W. 4714 (1991)]." Pet. 17. As the court below recognized, the *Gregory* "plain statement" rule is of no aid to petitioners here. *See* Pet. App. 19 ("*Gregory*'s plain statement rule is satisfied here since the FLSA clearly applies to state employees such as Biggs").

In *Gregory*, this Court held that the *coverage* provisions of the Age Discrimination Employment Act, 29 U.S.C. §§ 621-634, do not extend federal regulation so as to reach state judges. In reaching this conclusion, this Court declared that a federal statute will not be construed to regulate in areas of traditional state sovereignty, and thereby "upset the usual constitutional balance of federal and state powers," unless Congress "make[s] its intention to do so unmistakably clear in the language of the statute." 59 L.W. at 4716-17.

Gregory's "plain statement" rule thus involved the threshold question of *whether* Congress intended that a certain traditional state function be subject to a federal regulatory scheme. In this case, there is no controversy concerning that threshold issue. The language of the FLSA puts it beyond question that Congress did intend that state compensation practices regarding employees of the kind at issue here (highway maintenance workers) should be governed by the Act. *See* 29 U.S.C. §§ 203(d), (e) & (x) (provisions clearly stating that state employees are governed by FLSA).[5]

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[5] As early as 1974, Congress *unmistakably* applied the FLSA to state employees such as respondents, when the Legislature "extend[ed] FLSA coverage to virtually all state and local government employees." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985) (*citing* 88 Stat. 58, 60). In 1985, Con-

Given Congress' unmistakable intent to apply the FLSA to the employees in question, the only issue remaining is to determine the *precise substantive content* of the FLSA regulatory scheme. The imposition of a "clear statement" rule in this context would be unprecedented. This Court has never applied such a rule in this context. *See, e.g., Moreau v. Klevenhagen*, —— U.S. ——, 59 L.W. 4714 (1991) (construing FLSA overtime requirements as they apply to state employees, without any reference to *Gregory* or to any other "clear statement" rule). And, petitioners cite no authority from any other court for the proposition that a "clear statement" rule governs the interpretation of those federal statutes that do unmistakably apply to traditional state functions.

The logic of *Gregory* itself argues against petitioners' attempted expansion of the decision. *Gregory* states a special rule to answer an especially sensitive federalism question, *viz.*, whether Congress intended to expand coverage of a federal statutory scheme to govern an area of traditional state function that had *not previously* been subject to any such federal scheme, and thus to "upset the usual constitutional balance of federal and state powers." 59 L.W. 4716. If the answer to that question is "yes"—if Congress has squarely determined that the state function in question should be governed by the federal statutory scheme—that determination must be taken to entail the conclusion that all those uniform rules that make up that federal statutory scheme should govern the relevant function. Certainly that is the only fair conclusion here.

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gress substantially amended the FLSA to alter many of the substantive rules regarding compensation standards, as those rules apply to state employees, in order to accommodate certain of the special needs of state employers. In so doing, Congress left the coverage of the statute unchanged in all relevant respects. *See* Fair Labor Standards Amendments Act of 1985, P.L. 98-150; 99 Stat. 790 (1985).

The FLSA, as we have noted, unmistakably applies to private and public employers. And petitioners have never argued—nor could they have argued—that the statute evidences any intent that private employers and public employers be treated differently with regard to the statutory duties and policies at issue here. As to these matters, the same provisions govern *all* employers. And that is not mere happenstance.

In 1985 Congress extensively revised the FLSA to account for the special needs of state employers and to lessen the burdens that the FLSA places on the states. *See Moreau v. Klevenhagen, supra; see also* note 5, *supra.* As a result, a variety of special rules governing state employment practices are included in the statute. *See, e.g.,* 29 U.S.C. § 207(o) (special rules regarding overtime compensation of state employees). *None* of those amendments, however, would even arguably justify a special rule for state employment regarding the "timely payment duty" at issue here. Given this statutory structure and this history, Congress simply could not have been plainer.[6]

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[6] Even more misguided than petitioners' argument based on *Gregory* is petitioners' argument that the decision below conflicts with this Court's recent decision in *New York v. United States*, —— U.S. ——, 60 L.W. 4603 (1992). *See* Pet. 14-16.

In *New York*, this Court held that Congress may not, under the Commerce Clause, compel state governments to exercise their *regulatory powers* in the interests of a federal regulatory policy, *viz.*, Congress may not regulate "through the mechanism of mandating state regulation." 60 L.W. at 4613. But the Court explicitly emphasized that this holding had nothing to do with "whether . . . Congress [may] bring state governments within the orbit of generally applicable *federal* regulation." *Id.* at 4612 (emphasis in original). The instant case does not even arguably involve any federal mandate that a state exercise state regulatory authority; rather, it involves only a congressional decision to "bring state governments"—when they act as employers—"within the orbit of [the] generally applicable *federal* regulation" that governs employers and their compensation practices, *viz.*, the FLSA. *See* Pet. App. 19 (rejecting petitioners' *New York* argument).

C. The Instant Case Presents No Substantial Intrusions Into Federalism Interests That Would Justify Any Reconsideration Of This Court's *Garcia* Decision.

1. The FLSA's "timely payment" rule serves important national public policy purposes that Congress was fully entitled to further through Commerce Clause legislation. As this Court stated in the *Brooklyn Savings Bank* decision:

> [The FLSA] constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be . . . detrimental to maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers and to the free flow of commerce. [324 U.S. at 707 (emphasis added; internal quotation marks omitted).]

See also Sniadach v. Family Finance Corp., 395 U.S. 337, 341-42 (1969) (the postponement of a paycheck "may as a practical matter drive a wage-earning family to the wall").

Petitioners argue that the Constitution disables Congress from furthering these legitimate Commerce Clause policies in the public sector through *any* federal requirement that a state must pay wages to its employees in a regular and timely manner. *Any* federal "timely payment" rule, they argue, would put temporal pressures on the state budgetary process, thereby invading the "core of state self governance" protected by the Tenth Amend ment. Pet. 14.

On this basis, petitioners urge this Court to override *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and to hold that the application of *any* FLSA "timely payment" rule violates the Tenth Amendment.

2. "The very concept of the rule of law" renders "a respect for precedent . . . indispensable." *Planned Parenthood v. Casey*, —— U.S. ——, 60 L.W. 4795, 4801

(1992). Any plea for overruling must therefore be supported by a showing that the demands of *stare decisis* are outweighed by "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the . . . costs of . . . overruling a prior case." *Id.* Petitioners have made no such showing here.

This omission is not surprising: the relevant "prudential and pragmatic considerations" do *not* support the outcome that petitioners seek. Thus, the *Garcia* rule has certainly not "proved to be intolerable simply in defying practical workability." 60 L.W. at 4801 (*citing Swift v. Wickham*, 382 U.S. 111, 116 (1965)). Nor has it become "a remnant of abandoned doctrine" in relation to "related principles of law." 60 L.W. at 4801 (*citing Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989). And surrounding facts have certainly not "so changed" since the *Garcia* decision "as to have robbed the old rule of significant application." 60 L.W. at 4801 (*citing Burnet v. Colorado Oil Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting). In contrast, there has been substantial reliance on the law of *Garcia*. *See* 60 L.W. at 4801 (*citing United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924)).

2. Being unable to deal with this matter in any of these terms, petitioners assert in the most general terms, that a state's "basic governmental functions" are intolerably burdened by a federal "timely payment" rule. Pet. 19. That argument has a hollow ring.

First, the rule at issue requires only that FLSA compensation be paid on a timely basis under *whatever* regular pay scheme the employer has established. Under the FLSA, public employers—like private employers—may establish a regular pay period and a regular pay day that best meet their economic and administrative needs.

Second, under the FLSA rule the state has the widest latitude in making its own budget arrangements. A state

that does not finalize an overall budget is free, for example, to adopt a continuing resolution or other authorizing device for paying its employees' FLSA wages for *work that has been performed and for wages that are due.* Indeed, California law provides for budget arrangements that would allow the state to fully comply with its FLSA obligations during any budget controversy, if the state chooses to do so. And, during the 1992 budget controversy—unlike during the 1990 controversy—petitioners paid respondents their full wages on time by using these arrangements.[7]

And, third, as we have already noted, the only significant cost that, as a practical matter, has been imposed on the state in this case, is the cost of interest for the period during which the state withheld the wages due to its employees under the FLSA.

3. Petitioners, moreover, do not even claim that their concept of state sovereignty rests on any specific concept of state sovereignty recognized by this Court, or by any individual Justice. Indeed, petitioners' argument—that state sovereignty depends on the state's right to mandate that its employees, as a condition of continued employment, perform labor without receiving payment for that labor for an indefinite period after payment is due—denigrates the very dignity of the states that petitioners' profess to champion. And while petitioners' offer in this

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[7] At least since 1983, California law has provided that the State Controller may transfer up to ten percent of any appropriation for a state entity into a "revolving fund," which may be used by that state entity "for the purpose of payroll and other claims" if, due to a subsequent budget controvery, the legislature fails to pass, in a timely manner, a subsequent appropriation for that entity's operations. *See* Cal. Gov't Code § 13332. This provision of law was enacted specifically in order to ensure "continuity of state government in the event that a budget act for any fiscal year is not enacted by the first day of that fiscal year." 1983 Cal. Legis. Serv., Ch. 323, ¶ 19.5, p. 1755.

regard is phrased in terms of the public employer-employee relationship, that offer admits of no limits. Given the essential nature of petitioners' argument, *any* federal regulation imposing *any* obligation on a state to pay for goods or services by a date certain, or to pay interest on any past due debt or liability, would be equally contrary to the petitioners' conception of state sovereignty.

As the paucity of citations in the Petition indicates, this has *never* been the law. And, as is indicated by the lack of any reasoned defense in the Petition of this extraordinary expansion of "core" state authority, and equally extraordinary subordination of Congress' Commerce Power to a "state's sovereignty," it most certainly should not become the law.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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No. 93-772

In the

Supreme Court of the United States

October Term, 1993

PETE WILSON, Governor of the State of California;
JAMES W. VAN LOBEN SELS, Director of the
California Department of Transportation,
Petitioners,

v.

WILLIAM BIGGS, et al,
Respondents.

Petition for Writ of Certiorari to the
Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Counsel for respondent Biggs has withheld consent, necessitating the file of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of individual rights and government accountability will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Tenth Amendment and the Commerce Clause of the United States Constitution, as well as various cases involving government accountability (*e.g.* state tax reform issues, Cal. Const. Art. XIIIA ("Proposition 13" property tax rollback); state term limit litigation, *see* Cal. Const. Art. IV, § 1.5, *et seq.* (Proposition 140)); giving PLF extensive knowledge of the constitutional issues presented. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984), *Nordlinger v. Hahn*, 120 L. Ed. 2d 1 (1992); *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977); *Hoffman Homes, Inc. v. Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993); *Legislature v. Eu*, 54 Cal. 3d 492 (1991), *cert. denied*, 503 U.S. ___, 117 L. Ed. 2d 516 (1992). Thus, Pacific Legal Foundation's

concern is not for the State of California as a political entity, but for the accountability of that entity to its citizens.

In 1787, the individual States of this country delegated certain enumerated powers to the National government. A necessary (and often ignored) precursor to this delegation was the authorization by the citizens of these respective States, which allowed the States to make such a delegation. This "agency" provided the foundation and rationale of our federal system, with the States, as separate and indestructible entities, operating as a bulwark against the threat of an over-centralized, unresponsive and unrepublican National government.

Shortly after this delegation was made, its limited nature was emphasized in the Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.*

U.S. Const. Amend. X (emphasis added). This amendment (and it should be stressed that it *amended* the Constitution) not only highlights the sanctity of the sovereignty of the individual States, but premises that sanctity on the reservation of power to the people.

The Ninth Circuit ignored both the limited delegation of power to Congress embodied in the *interstate* Commerce Clause and the reservation of power to the States and the people. Amicus believes that the opinion below improperly construed the Fair Labor Standards Act (FLSA), improperly interfered with the sovereign functions of a state that go to the heart of representative government, ignored the limits the Tenth Amendment imposes on the congressional commerce power, improperly applied the "plain statement" rule, and improperly applied the principles enunciated by this Court in

Gregory v. Ashcroft, 501 U.S. ___, 115 L. Ed. 2d 410 (1991), and *New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120 (1992). In short, the court below unnecessarily rendered the government unaccountable to its constituents.

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: December, 1993.

Respectfully submitted,

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TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF AMICUS CURIAE . ii

TABLE OF AUTHORITIES CITED vi

OPINION BELOW 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 4

REASONS FOR GRANTING THE WRIT 5

I. THE NINTH CIRCUIT'S CONSTRUCTION OF THE FLSA RENDERS THAT ACT UNCONSTITUTIONAL IN THAT IT UNNECESSARILY INTRUDES UPON THE SOVEREIGNTY OF THE PEOPLE OF THE STATE OF CALIFORNIA 5

II. THE NINTH CIRCUIT IGNORED THAT THE FRAMERS OF THE CONSTITUTION INTENDED A BALANCE OF POWER BETWEEN THE STATES AND FEDERAL GOVERNMENT THAT WOULD PRESERVE THE REPUBLICAN CHARACTER OF THE UNION 8

III. WHAT REMAINS OF THIS COURT'S OPINION IN GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY WAS IMPROPERLY APPLIED TO THE PRESENT CASE BY THE NINTH CIRCUIT 12

Page

IV. THE NINTH CIRCUIT ERRED BY NOT APPLYING THE "PLAIN STATEMENT RULE" TO THE FLSA IN THE SAME MANNER THIS COURT HAS APPLIED IT TO THE ADEA 15

CONCLUSION 16

TABLE OF AUTHORITIES CITED

Page

CASES

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 7

Duncan v. McCall, 139 U.S. 449 (1891) 5,11,13

EEOC v. Wyoming, 460 U.S. 226 (1983) 15

Environmental Protection Agency v. Brown, 431 U.S. 99 (1977) 11

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 13

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) . . . 4,6-7,11,13

Gibbons v. Ogden, 22 U.S. 1 (1824) 10

Gregory v. Ashcroft, 501 U.S. ___, 115 L. Ed. 2d 410 (1991) . . . . . passim

Hodel v. Virginia Surface Mining and Reclamation Act, 452 U.S. 264 (1981) 13

Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975) 11

National League of Cities v. Usery, 426 U.S. 833 (1976) 6

Page

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 5

New York v. United States, 505 U.S. ___. 120 L. Ed. 2d 120 (1992) . . . . . passim

Parr v. State of California, 811 F. Supp. 507 (E.D. Cal. 1992) 3

Sugarman v. Dougall, 413 U.S. 634 (1973) 5,11

Texax v. White, 74 U.S. 700 (1871) 14

United States v. Darby, 312 U.S. 100 (1941) 10

UNITED STATES CONSTITUTION

Art. 1, § 8, cl. 1 10

cl. 4 10

cl. 17 10

§ 10, cl. 2 10

Tenth Amendment . . . . . passim

Fourteenth Amendment 14-15

Art. IV, § 4 10

CALIFORNIA CONSTITUTION

Art. IV, § 12, et seq. 3,5

Page

Art. XIIIA1 5

Art. XIIIB 5

STATUTES

Gov't Code § 526(a) 6

S. Rep. No. 159, 99th Cong., 1st Sess. (1985) reprinted in 1985 U.S.C.C.A.N. (1986) 6

29 U.S.C. § 621-634 15

S. Rep. No. 1487, 89th Cong. 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 3002-04 6

29 U.S.C. § 201, et seq. 6

MISCELLANEOUS

The Tenth Amendment: A "New" Limitation on Congressional Commerce Power, 45 Rutgers L. Rev. 417 (1993) 11

The Federalist No. 22 (Alexander Hamilton) 8

The Federalist No. 32 (Alexander Hamilton) 10

The Federalist No. 45 (James Madison) 9

Page

The Federalist No. 84
(Alexander Hamilton) 10

The Proper Scope of the Commerce Power,
73 Va. L. Rev. 1387 (1987) 10

Letter from the Federal Farmer (October 8, 1787)
reprinted in The Antifederalist Papers and
Constitutional Convention Debates 257,
(Ralph Ketcham, ed. 1986) 6

H.R. Rep. No. 913 93rd Cong., 2d Sess. (1974),
reprinted in 1974 U.S.C.C.A.N. 2822-53
(1975) 6

II The Debates of the Several States Conventions
on the Adoption of the Federal Constitution
as Recommended by the General Convention at
Philadelphia in 1787 at 62 (Jonathan Elliott,
ed., 2d ed. 1836) 8

II Elliot's Debates 424 9

IV Elliot's Debates 313 9

Laurance J. Tribe, American Constitutional Law
381 (2d ed., 1988) 7

No. 93-772

In the

Supreme Court of the United States

October Term, 1993

PETE WILSON, Governor of the State of California;
JAMES W. VAN LOBEN SELS, Director of the
California Department of Transportation,
Petitioners,

v.

WILLIAM BIGGS, et al,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the preceding motion and is adopted herein.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993). The court below, in affirming a lower court decision, 828 F. Supp. 774 (E.D. Cal. 1991), held that the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (FLSA), contained an *implied* "prompt payment" requirement that required the State of California to pay its employees "promptly," in derogation of the California constitutional and statutory provisions governing the State's budget process. 1 F.3d at 1539-44. Through these state constitutional and statutory provisions, the California voters have prohibited the expenditure of their taxes for any purpose until the Legislature has enacted, and the Governor has signed, a budget for that fiscal year. These provisions have been in place as far back as 1922.

The Ninth Circuit further held that adherence to its implied "prompt payment" requirement did not violate the State of California's sovereignty under the Tenth Amendment. *Id.* at 1543-44. In the court's eyes, the FLSA was "to be liberally construed to apply to the furthest reaches consistent with Congressional direction." *Id.* "To the extent compliance with the FLSA interferes with the state budgetary process, that interference is caused by state law, not federal law. The FLSA does not require California to pass a budget on time; it only requires California to do what all employers must do--pay its employees the minimum wage on payday." *Id.* at 1543. The court seemed to say that the State's remedy lies in ignoring its constitution and the will of the California electorate or, in the alternative, hastily enact a potentially wasteful or incomplete state budget solely for the purpose of complying with the Ninth Circuit's "prompt payment" requirement.

The Ninth Circuit also distinguished this Court's opinion in *Gregory v. Ashcroft*, 501 U.S. ___, 115 L. Ed. 2d

410 (1991), stating that the "plain statement" rule was inapplicable to the present case because "the FLSA clearly applies to state employees such as Biggs." 1 F.3d at 1544. The Ninth Circuit did not address the issue of whether a State's constitutionally mandated budget process was worthy of heightened scrutiny as a matter that went to the heart of representative government. *See Ashcroft,* 115 L. Ed. 2d at 421-28. This Court's opinion in *New York v. United States* was also found to be inapplicable because the Ninth Circuit read that case as dealing solely with the scope of Congress' Commerce Clause powers, not the Tenth Amendment protection of a State's existence as a separate and viable political entity. 1 F.3d at 1544.

STATEMENT OF THE CASE

Pacific Legal Foundation adopts Governor Wilson's Statement of the Case and incorporates that portion of the Governor's Petition for Certiorari herein with the following amplification: The People of California have exercised their prerogative in requiring that a state budget be enacted by the Legislature and signed by the governor before the government may spend one dollar of the taxpayers' money. *See* Cal. Const. Art. IV, § 12, *et seq.*, Cal. Govt. Code § 13340. For the time period in question, the State of California had no authority to issue pay "warrants" in lieu of paychecks. *See id.* Further, another recent federal court case found that such pay warrants, issued in subsequent years, were also in violation of the FLSA. *Parr v. State of California*, 811 F. Supp. 507 (E.D. Cal. 1992). Thus, the impact of the Ninth Circuit's decision on California's sovereignty, and its citizens' ability to maintain control over their government, will be extreme. The impact on state employees (not to mention interstate commerce) was minimal, because the state employees, along with the myriad benefits peculiar to state employment, were guaranteed their salaries as soon as a budget was enacted. Further, state employees have different contractual expectations than

private sector employees. State workers take their jobs with the knowledge that they are public servants, that their paychecks are paid with tax dollars, and are subject to the above-mentioned state constitutional and statutory provisions.

SUMMARY OF THE ARGUMENT

In *Biggs v. Wilson,* the Ninth Circuit Court of Appeals erred in construing the FLSA to contain an implied "prompt payment" requirement. Such a requirement renders that Act unconstitutional in that it unnecessarily intrudes upon the sovereignty of the people of the State of California. Control of its own budget and law-making process by a State is one of the greatest attributes of state sovereignty. Thus, the court below improperly rejected a Tenth Amendment challenge to its "prompt payment" requirement because, in its eyes, the FLSA did not require that California pass its budget on time, the California constitution did.

Additionally, the court below ignored the intent of the Framers and Ratifiers of the Constitution to have the States act as a check on federal tyranny. The Ninth Circuit's opinion renders that check meaningless.

Further, the Ninth Circuit failed to distinguish *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which, because of the nature of the present case, is easily distinguished.

Finally the court below improperly distinguished *Gregory v. Ashcroft* and *New York v. United States*. It ignored the "plain statement" rule which requires that the judiciary not construe an ambiguous statute so as to intrude on state functions that go to the heart of representative government. A State's budgetary process, as well as its law-making powers, epitomize a state function that goes to the heart of representative government.

To allow the Ninth Circuit opinion to stand would be to ignore the intent of the Framers of the Constitution and the nature and spirit of our system of dual sovereignty.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S CONSTRUCTION OF THE FLSA RENDERS THAT ACT UNCONSTITUTIONAL IN THAT IT UNNECESSARILY INTRUDES UPON THE SOVEREIGNTY OF THE PEOPLE OF THE STATE OF CALIFORNIA

Control of its own budget and lawmaking process by a State is one of the greatest attributes of state sovereignty. *Duncan v. McCall*, 139 U.S. 449 (1891). *See also Sugarman v. Dougall*, 413 U.S. 634 (1973); Gregory v. Ashcroft, 115 L. Ed. 2d; and *New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120 (1992). The ability to raise and spend revenue in a manner and amount seen fit by the citizens of a State is the lifeblood of sovereign existence. In the State of California, this issue is of particular importance with a citizenry that has become particularly active through the form of the initiative and referendum in creating "the structure of its government," *Ashcroft*, 115 L. Ed. 2d at 423. Choosing to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" *(New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting)), various state constitutional amendments have been enacted in an effort to curtail the proclivity of government to expand itself. *E.g.*, Const. Art. IV, § 12; Art. XIIIA (Proposition 13 property tax roll-back and limitation); Art. XIIIB (government spending limitation); Art. IV, § 1.5, *et seq.* (Proposition 140 state term limits and legislative spending cap). *See also* Govt. Code § 526a (citizen suit to prevent

government funds).[1] This is a great benefit of our federal system where "[d]ifferent laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded." Letter from the Federal Farmer (October 8, 1787), *reprinted in The Antifederalist Papers and Constitutional Convention Debates* 257, 264 (Ralph Ketcham, ed. 1986).

The FLSA, 29 U.S.C. § 201, *et seq.*, deals almost exclusively with minimum wages and overtime compensation. *See* 29 U.S.C. § 201, *et seq.;* S. Rep. No. 1487, 89th Cong. 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002-04. Its legislative history and the precedent construing the Act have all dealt with it in terms of the effect minimum wage and overtime compensation requirements would have on the States' ability to function as independent and indestructible entities. *See, e.g.* H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811-53 (1975); *National League of Cities*, 426 U.S. at 837-55; and *Garcia*, 469 U.S. at 554-55. The effect was deemed minimal and the Act a constitutional exercise of congressional commerce power. *See Garcia*, 469 U.S. at 554-55; S. Rep. No. 159, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S.C.C.A.N. 664 (1986).

Under the "prompt payment" requirement, however, the state legislators are rendered unaccountable to their citizens and to their state constitution. They must now enact a budget, no matter how poorly drafted, wasteful,

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[1] In *National League of Cities v. Usery*, 426 U.S. 833, 846-47 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court noted the impact that congressional action could have on California's financial well-being under the circumstances of that case. By comparison, the Ninth Circuit's opinion in *Biggs* will have an even greater negative impact.

inappropriate, or outrageous in the eyes of the polity, because the Ninth Circuit believes that Congress would require that state employees be paid promptly on pay day no matter what the consequences. *See Biggs*, 1 F.3d at 1544 (Trott, J., dissenting). Under the Ninth Circuit's construction of the FLSA, its impact will no longer be minimal or constitutional. By holding that its "prompt payment" requirement did not contravene the Tenth Amendment, the Ninth Circuit stated that any interference with California's budget process was created by state law, not federal law. *Biggs*, 1 F.3d at 1543. This is the functional equivalent of finding a gunshot victim guilty because he got in the way of the bullet.

In what can only be described as part of "the tyranny of small decisions" (Laurence H. Tribe, *American Constitutional Law* 381 (2d ed., 1988)), the court below has given "the state-displacing weight of federal law to mere congressional *ambiguity*" *(see id.* at 480). The Ninth Circuit erred in its construction of the statute, its state sovereignty analysis, and in its application of this Court's recent precedent regarding federal intrusion into the realm of state governmental functions. *See Ashcroft,* 115 L. Ed. 2d 410; *New York v. United States*, 120 L. Ed. 2d 120; and *Garcia*, 469 U.S. 528. What the Ninth Circuit did, in effect, was exercise *legislative* power in finding the "prompt payment" requirement, since such a requirement was not "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985). *See also Ashcroft,* 115 L. Ed. 2d at 424.

II

THE NINTH CIRCUIT IGNORED THAT THE FRAMERS OF THE CONSTITUTION INTENDED A BALANCE OF POWER BETWEEN THE STATES AND FEDERAL GOVERNMENT THAT WOULD PRESERVE THE REPUBLICAN CHARACTER OF THE UNION

The Framers of the United States Constitution at Philadelphia were primarily concerned with the inability of the Confederation to conduct the business of the nation, hamstrung as it was, by the overriding reservation of powers to the States and the "Whiggish" democratic ideals still fresh from the Revolutionary War. As Alexander Hamilton stated, "[t]he interfering and unneighborly regulations of some States ... if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy." *The Federalist No. 22*, at 144-45 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). The Framers believed that their proposed government could sufficiently provide the stability and unity necessary for a strong economy and international presence, while at the same time ensure individual liberty.

The delegates to the various state ratifying conventions, however, greatly feared consolidation of power in the District of Columbia. "After we have given them all our money, established them in a federal town, given them the power . . . to establish their arbitrary government, what resources do the people have left?" II *The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* at 62 (Jonathan Elliot, ed., 2d ed. 1836) (hereinafter *Elliot's Debates*). "Liberty! What is Liberty? The power of governing yourselves. If you adopt this Constitution, have

you this power? No: you give it into the hands of a set of men who live one thousand miles distant from you." IV *Elliot's Debates* 313.

To calm these fears, and assure ratification, the Federalists claimed that the structure of the Constitution would protect state sovereignty and personal liberty.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite .... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern . . . *the internal order*, improvement, and prosperity of the State.

The Federalist No. 45 at 292-93 (James Madison) (Clinton Rossiter, ed. 1961) (quoted in *Ashcroft*, 115 L. Ed 2d at 422 (first alteration in *Ashcroft*, emphasis added)). As James Wilson stated at the Pennsylvania ratifying convention:

> Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

II *Elliot's Debates* 424. Under the unamended Constitution the States would "alienate" their sovereignty to the new National government in only three cases:

> where the Constitution in express terms granted an *exclusive* authority to the Union; where it granted in one instance an authority to the Union, and in

> another *prohibited* the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

The Federalist No. 32 at 197, 198 (Alexander Hamilton) (Clinton Rossiter, ed. 1961) (first and second emphasis added) (discussing U.S. Const. Art. 1, § 8, cl. 17; *id.* cl. 1; *id.* § 10, cl. 2; *id.* § 8, cl. 4).

This delineation of the spheres of sovereignty was expressed *before* the adoption of the Tenth Amendment, or any other of the first ten amendments to the Constitution. In fact, Alexander Hamilton predicted that the adoption of a Bill of Rights would give the National government the "colorable pretext" to run roughshod over the jurisdictional restraints imposed on it by the text of the Constitution by legislating right up to the edge of the first eight amendments. *The Federalist No. 84* at 513 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). *See also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). Congress, however, has been permitted to ignore the Tenth Amendment and encroach on state sovereignty with impunity since 1937. Even in *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824), which is often cited for the very broad power Congress has under the Commerce Clause, it was noted that the congressional power to regulate interstate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations *other than those prescribed in the Constitution*." *Gibbons v. Ogden*, 22 U.S. 1 (quoted in, *e.g.*, *United States v. Darby*, 312 U.S. 100, 114 (1941) (emphasis added). In the present case, this Court must enforce the "limitations prescribed" by the Tenth Amendment, the "few and defined" nature of congressional powers, and the guarantee to the States of a republican form of government, U.S. Const. Art. IV, § 4.

The decision of the Ninth Circuit is horribly inconsistent with the intent of the Ratifiers, who considered the limitation of federal encroachment into the realm of the States as the primary assurance of republican accountability and personal liberty. Prevalent in every slate of amendments proposed by the various ratifying conventions was a call to protect the sovereignty of the States for this purpose. *See* John G. Schmidt, Jr., *The Tenth Amendment: A "New" Limitation on Congressional Commerce Power*, 45 RUTGERS L. REV. 417, 426-27 & n.56 (1993).

This Court must therefore correct the error of the Ninth Circuit in *Biggs* and continue on the path taken in such cases as *Sugarman v. Dougall*, 413 U.S. 634; *Gregory v. Ashcroft*, 115 L. Ed. 2d 410; and *New York v. United States*, 120 L. Ed. 2d 120, to preserve some semblance of balance between the States and National government, especially when the issue involves the inherently sovereign act of a State's budget process and lawmaking powers, as well as the control of that State's citizens over its taxing and spending habits. *Duncan v. McCall*, 139 U.S. at 461. *See also Maryland v. Environmental Protection Agency*, 530 F.2d 215, 225 (4th Cir. 1975) ("if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws"), *vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977) (*per curiam*). To do otherwise would eviscerate the States' ability to act not only as a check on the National government, but as a laboratory for reform geared to the effective administration of government.

III

WHAT REMAINS OF THIS COURT'S OPINION IN GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY WAS IMPROPERLY APPLIED TO THE PRESENT CASE BY THE NINTH CIRCUIT

In 1985, the five Justices of this Court that comprised the majority in *Garcia,* 469 U.S. 528, rejected "almost 200 years of the understanding of the constitutional status of federalism ... in support of the view that the role of the States in the federal system may depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court." *Id.* at 560-61 (Powell, J. dissenting). *Garcia*, however, may be distinguished from the present case, both in its law and its facts, because that case dealt solely with the applicability of specific and explicit federal legislation to persons employed in areas that were arguably "traditional governmental functions." *Id.* at 533-47, 554-57. In *Biggs*, however, the Ninth Circuit added an "implied prompt payment provision" to the FLSA thus threatening the independent existence of the States. Thus, even though the FLSA is generally applicable to both public and private employers, (unlike the legislation in *New York v. United States,* 120 L. Ed. 2d 120), the effect is the same in that the States, as a check on federal power, are rendered powerless before an unlimited federal reach.

Additionally, in *Garcia* this Court stated that the "*principal* [but not the sole] means" for ensuring state sovereignty "lies in the structure of the federal government itself," 469 U.S. at 550-51 (emphasis added), and "[a]ny substantive restraint on the exercise of Commerce Clause powers ... must be tailored to compensate for possible failings in the national political process. *Id.* at 554. Such a failing was identified in *Ashcroft* as a legislative ambiguity (115 L. Ed. 2d at 425-26), and in *New York* as an attempt to

commandeer the legislative processes of a State (120 L. Ed. 2d at 140, 144 (discussing *Hodel v. Virginia Surface Mining and Reclamation Act*, 452 U.S. 264, 288 (1981))). In *Biggs*, the Ninth Circuit did not even bother to find an ambiguity, it crafted its own legislation and, as a result, commandeered not only the legislative processes of California, but its constitutional processes and republican form of government as well. The State of California must now enact a budget, no matter how poorly drafted, wasteful, inappropriate, or outrageous in the eyes of the polity because the Ninth Circuit believed Congress commanded that state employees be paid promptly on pay day no matter what the consequences.

This Court in *Garcia* cautioned that there were several constitutional "postulates which limit and control" congressional power that the federal courts "must look for" so as to "be faithful to the underlying federal premises of the Constitution." 469 U.S. at 547. The *Garcia* majority, while noting the problems of judicial review, conceded that the National government cannot devour the essentials of state sovereignty. *Id.* The Ninth Circuit failed to realize this. The *Garcia* Court also quoted with approval the fact that the Constitution "recognizes and preserves the autonomy and independence of the States--independence in their legislative and independence in their judicial departments." *Id.* at 549 (quoting *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78-79 (1938)). The Ninth Circuit's ruling ignores this recognition.

Furthermore, an additional "postulate" was identified in *New York* and *Ashcroft:* that federal actions which threaten the guarantee of a republican form of government must be reviewed by the judiciary. *See Ashcroft,* 115 L. Ed. 2d at 425-26; *New York,* 120 L. Ed. 2d at 155-57. That this protection should apply to a state's lawmaking powers, in the face of the congressional commerce power, is obvious. *See, e.g., Duncan v. McCall*, 139 U.S. 449 (1891). This is especially so when congressional power under Section 5 of

the Fourteenth Amendment is not at issue. *See Ashcroft*, 115 L. Ed. 2d at 420-32, 425 n.*.

Even if this Court finds that Congress did intend a "prompt payment" requirement against the States, this Court should revisit the holding of *Garcia* in light of its more recent decisions in *Ashcroft* and *New York*. The Commerce Clause grants an enumerated, defined power over "commerce *among* the several states." The fact that state employees were paid two weeks late pursuant to state constitutional and statutory provisions cannot be considered within this grant of congressional jurisdiction. Further, the Tenth Amendment emphasizes the structural limits that the Commerce Clause imposes on congressional intrusion into state functions that go to the heart of representative government and gives substance to the guarantee to every State of a republican form of government.

Thus, it is imperative that this Court grant review in this case to correct the Ninth Circuit's overbroad interpretation of the holding of *Garcia* and the improper construction of the FLSA. Review is necessary because the ruling of the Ninth Circuit subverts the constitutional mandate of "an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. 700, 725 (1871).

IV

THE NINTH CIRCUIT ERRED BY NOT APPLYING THE "PLAIN STATEMENT RULE" TO THE FLSA IN THE SAME MANNER THIS COURT HAS APPLIED IT TO THE ADEA

In 1991, this Court construed the federal Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (ADEA), so as to not conflict with a Missouri state constitutional provision mandating the retirement of state court judges at seventy years of age. *Ashcroft,* 115 L. Ed. 2d 410. The Court framed its approach by noting that Congress had, in fact, extended the ADEA to the States. *Id.* at 426 (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983) (ADEA extension to States valid under Commerce Clause). The *Ashcroft* Court stated, however, that it must be *absolutely certain* that Congress intended the specific intrusion at issue. *Id.* The Court went on to hold that, because of the specific ambiguity in the ADEA as to whether appointed state court judges were to be included within the scope of the ADEA, it "would not attribute to Congress an intent to intrude on state governmental functions ...." *Id.* at 430. In the present case, the Ninth Circuit misinterpreted *Ashcroft*, the applicability of the plain statement rule, and the breadth of the FLSA.

The *Ashcroft* case dealt with the maximum age of state court judges. The present case deals with the State of California's authority over its own budget process and law-making ability. This latter issue should also be treated by the federal courts as an issue that "goes beyond an area traditionally regulated by the States." *Id.* The present case is even more compelling than *Ashcroft*, since the *Ashcroft* Court conducted its analysis of the ADEA under both the Commerce Clause and Section 5 of the Fourteenth Amendment. *See id.* at 420-32. Unlike the Commerce Clause, the Fourteenth Amendment was intended to intrude

into the sovereign functions of a State (*see id.* at 425, n.*), and should give a court pause before striking down legislation that intrudes into certain sovereign functions of a State. The FLSA, however, was *not* enacted pursuant to the Fourteenth Amendment. It was enacted solely under Congress' commerce power. This being the case, the concerns of a State's citizens over their State's budget, "a decision of the most fundamental sort for a sovereign entity," should be accorded much more deference than that given by the Ninth Circuit. The FLSA does not contain a "plain statement" of congressional intent to impose a "prompt payment" requirement on the States. In fact, the statute is ambiguous, if not indifferent to the issue. The ambiguity in the FLSA regarding the prompt payment of state employee wages must therefore be construed in favor of the State of California and its citizens.

CONCLUSION

The Ninth Circuit's "implied prompt payment requirement" in the FLSA is a misconstruction of the intent and language of the FLSA and contradicts this Court's plain statement rule. Even if it were the intent of Congress to require such "prompt payment," this would upset the usual constitutional balance of federal and state powers as well as

violate the Tenth Amendment, the Guarantee Clause, and the Commerce Clause itself. The Court should therefore grant review to determine these important constitutional and statutory issues and correct the errors of the court below.

DATED: December, 1993.

Respectfully submitted,

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